IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 402

UNITED STATES OF AMERICA,

Petitioner,

—v.—

SHELDON A. KEY,

Trustee.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BANKRUPTCY DOCKET

UNITED STATES DISTRICT COURT

WILLIAM E. STECKLER, JUDGE
1569 Bktcy

D. C. Form No. 117A Rev.

In the matter of

HANCOCK-TRUCKING, INC. DEBTOR, (See Bktcy Docket), Date, dd;Name or Receipt No., Balance brought fwd; Rec. 30.00

STATISTICAL RECORD

J.S. 24 mailed
J.S. 19 mailed

Referee:

Paul A. Pfister

Trustee:
& Receiver—Sheldon A. Key, Fletcher Trust Building, Indianapolis, Indiana
Bamberger & Feibleman, Attorneys for Trustee, 102 E. Market Street, Indianapolis, Indiana

DATE	PROCEEDINGS
3/ 5/62	Frances Belder II, J. Beldler Camp, and Arthur G. Halverson, as Trsutees [sic] of the Francis Beldler Charitable Trust Created under the Last Will and Testament of Francis Beldler, Deceased, and American Telephone and Telegraph Company, Chicago & Eastern Illinois Railroad Company and Monon Railroad, file petition to amend plan of reorganization and to direct Trustee to take property and assets of debtor with proof of service.
3/16/62	Order entered directing Trustee to Retake Property and Assets of Debtor. (SE) O.B. Vol. II, Page 391.

* * * *

DATE	PROCEEDINGS
8/10/62	Court grants Trustee's petition to employ an auctioneer and to sell the assets of debtor located at Evansville, Indiana. Ordered that the Trustee is authorized to sell free and clear of all valid liens personal property belonging this estate and located in Evansville, and said Trustee is authorized to engage Continental Industries, Division of Continental Finance Corp. as auctioneer; Ordered that proceed from the sale of the items shall be held by Trustee in a special trust until such time as the rights thereto between the Trustee and National Leasing Co., Inc. have been determined; Ordered that the Trustee make due report of his actions under this order, and further Ordered that the auction sale of said property is hereby approved, provided that the amount received therefor is not less than 75% of its appraised value. (SE) See entry for other orders to Auctioneer in re sale of said assets. Court enters order approving sale of operating rights to Hennis Freight Lines, Inc. (SE)
	* * * *
6/23/67	Trustee fi petition to approve modification agreement of sale of operating rights and to fix time of hearing on plan of reorganization. Trustee fi petition to classify creditors and stockholders; proposal of amended plan; and Report of Operations from April 1, 1967 to April 30, 1967.
7/ 3/67	Court enters order fixing hearing under Sec. 169 and 236(2) and for approval of modification agreement. Hearing set for Aug. 7, 1967, at 2:00 P.M., Indpols., Ind. Court enters order classifying creditors and stockholders.
	* * * *
8/ 7/67	Ohio Fast Freight, Inc. fi objections to approval of plan.
	* * * *

DATE	PROCEEDINGS
8/18/67	Court GRANTS Trustee's Motion for Continuance of hearing set for August 21, 1967. Cause reset for hearing on Sept. 7, 1967, at 9:30 A.M.
9/14/67	Trustee fi report of operations from June 1, 1967 to June 30, 1967. Trustee fi report of operations from July 1, 1967 to July 31, 1967. Trustee fi memorandum in support of approval of the Trustee's amended plan or reorganization in regard to tax claims by the Government.
9/15/67	Court enters order approving sale of Indiana intrastate operating authority.
9/18/67	Gov't. fi memorandum brief in regard to tax claim of Government.
9/21/67	Court enters order approving modification agreement of sale of operating rights and approval of amended plan of reorganization.
9/28/67	Court enters Notice to Secretary of Treasury to Accept or Reject amended plan for reorganization.
10/12/67	Marjory H. Schlamp fi Affidavit of Mailing Notice to all Creditors of Hancock-Trucking, Inc., Amended Plan of Reorganization, Summary of Trustee's Amended Plan of Reorganization, Statement of Assets and Liabilities, etc.
	* * * *
11/20/67	Trustee fi Notice of Rejection of Amended Plan of Reorganization, etc.
11/22/67	Order entered continuing hearing on confirmation. Hearing continued to December 8, 1967.
	* * * *
12/19/67	Order entered Confirming Plan.
1/26/68	United States Fi Notice of Appeal.
	* * * *

DATE	PROCEEDINGS
2/ 7/68	Trustee fi Petition to Amend Schedule of Liabilities and Claims from Participation. Trustee fi Petition to Offset Claims against the United States of America. Trustee fi Objections to Claim of Firemen's Fund Insurance Company and to Related Claims. Trustee files Petition to Clarify and Allow Claims Relating to Highway Use Tax.

* * * *

RELEVANT DOCKET ENTRIES IN COURT OF APPEALS

DATE	
2/27/69	Opinion, Gordon, Dist. Ct. J.
2/27/69	Judgment

FORM 2317

U. S. Treasury Department—Internal Revenue Service

PROOF OF CLAIM FOR INTERNAL REVENUE TAXES

IN THE AMENDED CONSOLIDATED COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

Docket No. 1569-B

Filed Aug 7 1962, Paul A. Pfister, Referee in Bankruptcy

IN THE MATTER OF:

HANCOCK TRUCKING, INC., Evansville, Indiana

TYPE OF PROCEEDING:

Reorganization Chapter X
Claim of the United States for Internal Revenue Taxes

The undersigned officer of the Internal Revenue Service, a duly authorized agent of the United States in this behalf, being duly sworn, deposes and says that:

1. HANCOCK TRUCKING, INC., is justly and truly indebted to the United States in the sum of $376,768.61 with interest thereon as hereinafter stated;

2. The said debt is for taxes due under the internal revenue laws of the United States as follows:

Balance of tax due on Judgment entered in original Chapter X Proceeding under date of July 30, 1956.

Kind of Tax And Period	Reference No.	Amount Due	Remarks	Date Tax Lien Arose
Principal		$134,055.03*		
Accrued interest		47,508.30		
		$181,563.333	*Daily interest rate is $21.4488	
New Liabilities				
Withholding Tax				
1st Qtr. 1961—Bal. of tax		$ 27,043.19*		9-1-61
Interest to 3-6-62		1,383.04		
2nd Qtr. 1961		64,683.65*		9-1-61
Interest to 3-6-62		2,327.43		
3rd Qtr. 1961		53,083.35*		11-16-61
Interest to 3-6-62		1,110.38		
4th Qtr. 1961—Bal. of tax		19,735.46*		2-14-62
Interest to 3-6-62		110.27		
1st Qtr. 1962—Bal. of tax		10,493.86		4-23-62
Excise Tax				
Highway Use Tax—1961		11,490.00*		10-20-61
Interest to 3-6-62		353.32		
4th Qtr. 1961—Bal. of tax		142.68		3-2-62
1st Qtr. 1962		84.36		4-20-62
Unemployment Tax				
1961		2,770.22		4-6-62
1961		394.07	American Leasing Co., Inc.	3-16-62
		$195,205.28		
Total liability due		$376,768.61	*Daily interest rate on $176,035.65 is $28.1657	

3. No part of said debt has been paid and the same is now due and payable at the Office of the District Director of Internal Revenue;

4. There are no set-offs or counterclaims to said debt;

5. Except for the statutory tax liens which arose on the dates above stated, the United States does not hold, to the deponent's knowledge or belief, any security or securities for said debt; except as shown on the sheet attached to this claim;

6. No note or other negotiable instrument has been received for said debt or any part thereof, nor has any judgment been rendered with respect to said debt, and

7. Said debt has priority and must be paid in full in advance of distribution to creditors as and to the extent provided by law:

IN BANKRUPTCY ACT PROCEEDINGS see Sections 64, 77e, 199, 337(2), 455, and 659 of the Bankruptcy Act (11 U.S.C. 104, 205(e), 599, 737(2), 855, and 1059).

IN OTHER PROCEEDINGS see Section 3466 of the Revised Statutes (31 U.S.C. 191). Also, attention is invited to Section 3467 (31 U.S.C. 192) with respect to the personal liability of any executor, administrator, or other person who fails to pay the claims of the United States in accordance with their priority.

August 3, 1962

/s/ HELEN C. WILDE

Chief, Special Procedures Section
Office of the District Director of Internal Revenue

P.O. Box 348
Indianapolis, Indiana

Hancock Trucking, Incorporated, 2330 Victory Parkway, Cincinnati, Ohio, on October 11, 1961, deposited with the District Director of Internal Revenue, Indianapolis, Indiana, as collateral for the payment of federal tax liability accrued during the first quarter, 1961, and subsequent periods, including Federal Income Tax Withheld at Source, Federal Insurance Contributions Tax, Federal Unemployment Tax, and Excise Tax, the following certificates:

1. Interstate Commerce Commission Evidence of Issue of Certificate of Public Convience and Necessity No. MC-25567 Sub 8, Sub 13, Sub 15, Sub 16,

Sub 17, Sub 18, Sub 19, Sub 20, Sub 23, and copies of Sub 24, Sub 25, Sub 28, Sub 30, Sub 31, Sub 33, Sub 36, Sub 37, Sub 38, Sub 39, Sub 40, and Sub 41.

2. Certified Copy of State of Indiana Certificate of Public Convenience and Necessity Certificate No. 311-A, 311-A-8, 311-A-9, 311-A-10, 312-A, 312-A-12, 312-A-13, 312-A-14, 312-A-15, and 312-A-16.
3. Certified copy of State of Illinois Certificate of Public Convenience and Necessity as a Common Carrier of Property by Motor Vehicle, File Number 8124MC.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[Caption Omitted]

Order Approving Sale of Operating Rights to Hennis Freight Lines, Inc.

At Indianapolis, Indiana, on the 6th day of August, 1962, hearing was held before the undersigned on the petition of Sheldon A. Key, trustee herein, to approve the sale of the operating rights of the debtor to Hennis Freight Lines, Inc., said petition is dated June 20, 1962, and was filed herein on June 25, 1962, and is in the words and figures following, to-wit: (H.I.)

Said hearing was held pursuant to an order of this court dated June 26, 1962, and notice of the relief prayed for was given to the debtor, and to all parties authorized to intervene in the proceedings, including the Securities and Exchange Commission, the Interstate Commerce Commission, the Secretary of the Treasury, the United tSates Attorney, and the Attorney-General of the State of Ohio, pursuant to the order of this court dated June 26, 1962.

At said hearing the trustee appeared in person and by his general counsel, Sigmund J. Beck and James W. Beatty of Bamberger & Feibleman, Indianapolis, Indiana, and by Ferdinand Born, Indianapolis, Indiana, special counsel for Interstate Commerce Commission matters; R. Stanley Lawton, of Ross, McCord, Ice & Miller, Indianapolis, Indiana, appeared for Fruehauf Trailer, a creditor; Bernard Boyle appeared for the District Director of Internal Revenue, the Secretary of the Treasury, and the United States; Russell Fisher, South Bend, Indiana, appeared on behalf of the Board of Directors of Hancock-Trucking, Incorporated; John J. Lokos appeared on behalf of Mark McElroy, the Attorney-General of the State of Ohio; and Jack Rogers of Roberts & Ryder, Indianapolis, Indiana, appeared on behalf of John L. Rigsby a creditor.

And the State of Ohio having filed herein, on August 6, 1962, its objection to the transfer of the operating authority of Sheldon A. Key, trustee of Hancock-Trucking, Incorporated, to Hennis Freight Lines of Winston-Salem, North Carolina, and the court having heard evidence on said petition of the trustee and on the objection of the Attorney-General of the State of Ohio; and having heard counsel representing various interests, and upon all of the proceedings had before me at said hearing, the court now finds the following:

FINDINGS OF FACT

1. That Sheldon A. Key was appointed trustee of Hancock-Trucking, Incorporated, debtor herein, on May 4, 1954; that following confirmation of a plan of reorganization, the trustee transferred the property of Hancock-Trucking, Incorporated to the reorganized debtor on June 1, 1958.

2. That said trustee was revested with the property of the debtor on March 15, 1962, pursuant to an order of this court.

3. That subsequent to June 1, 1958, and prior to March 15, 1962, Hancock-Trucking, Incorporated entered into an agreement for the lease and eventual sale of the operating rights of the debtor to Hennis Freight Lines,

Inc. A copy of said agreement is attached hereto, made a part hereof, and marked Exhibit "A".

4. That both prior and subsequent to March 15, 1962, the trustee and his general counsel actively engaged in negotiations and numerous conversations with various parties besides Hennis Freight Lines regarding the sale of the debtor's operating rights.

5. That neither the debtor nor the trustee or his counsel has ever been offered more for the operating rights of Hancock-Trucking, Incorporated, than that which Hennis Freight Lines, Inc., has agreed to pay in its agreement with the debtor.

6. That on June 25, 1962, the trustee filed a petition in these proceedings for authority to affirm the sale of the operating rights of the debtor to Hennis Freight Lines, Inc.; that a copy of said petition was mailed to the Attorney-General of the State of Ohio.

7. That a detailed notice of the trustee's petition for authority to affirm the agreement between Hancock-Trucking, Incorporated and Hennis Freight Lines, Inc., and of a hearing thereon to be held on August 6, 1962, was mailed to all creditors, stockholders and other parties in interest, including the Attorney-General of the State of Ohio, on July 10, 1962; said notice contained the basic terms of the contract including the purchase price and manner of payment.

8. That no new offers to purchase the operating rights of Hancock-Trucking, Incorporated, were submitted to the trustee or his counsel following the mailing of said notice and prior to the hearing before this court on August 6, 1962.

9. That other than the objection of the Attorney-General of the State of Ohio, which was filed immediately prior to the hearing on August 6, 1962, no objections to the trustee's petition have been filed by any creditor, stockholder, or other party in interest.

10. That Hennis Freight Lines, Inc., has preserved the operating rights of Hancock-Trucking, Incorporated, by leasing these rights from the trustee and operating under them during these proceedings.

11. That the purchase price to which Hennis Freight Lines, Inc., has agreed is fair and reasonable.

CONCLUSIONS OF LAW

1. That it would be in the best interests of this estate for the trustee to be authorized to affirm the sale of the operating rights of Hancock-Trucking, Incorporated, to Hennis Freight Lines, Inc.

2. That the objection of Mark McElroy, Attorney-General of the State of Ohio, should be overruled (1) on the grounds that the trustee has demonstrated that it would be in the best interests of this estate to affirm the sale of the operating rights to Hennis Freight Lines, Inc., and the Attorney-General of the State of Ohio has offered no evidence that said sale would not be in the best interests of this estate, and (2) on the grounds that the objection was untimely.

And, accordingly it is

ORDERED that the trustee be, and he hereby is, authorized to affirm the contract of sale of the operating rights of the debtor to Hennis Freight Lines, Inc., and it is further

ORDERED that the trustee be, and he hereby is, authorized and directed to take such steps as are necessary to conclude said sale; and it is further

ORDERED that the objection filed herein by Mark McElroy, Attorney-General for the State of Ohio, be, and it hereby is, overruled.

DATED this 10th day of August, 1962.

WILLIAM E. STECKLER,
District Judge

[Distribution omitted]

EXHIBIT A

THIS AGREEMENT, made in South Bend, Indiana, this the 15th day of February, 1962, by and between Hennis Freight Lines, Incorporated, a North Carolina corporation with its principal office in Winston-Salem, North Carolina, hereinafter referred to as "Hennis", and Hancock-Trucking, Incorporated, an Indiana corporation with its principal place of business in Evansville, Indiana, hereinafter referred to as "Hancock".

WITNESSETH:

WHEREAS, Hancock is a corporation engaged in the business of a motor common carrier pursuant to certificates issued by the Interstate Commerce Commission in Docket No. MC 2-5567 and sub-numbered dockets; and

WHEREAS, Hancock has for many years rendered outstanding service as a motor common carrier of property on a profitable basis, but during recent years it has suffered losses and at the present time is losing money on its operation; as of November 30, 1961 the operating loss of Hancock was One Million Ninety Three Thousand Seventy Three Dollars and Thirty Cents ($1,093,073.30).

WHEREAS, the operations of Hancock are unprofitable, and the management provided by the Stockholders is unable to arrest the operating losses and to properly finance its operations, and as a consequence, its financial obligations have become greater than it can continue to meet, and Hancock and its Stockholders are in danger of losing control and management of their business because of defaults in the payments of its financial obligations; and

WHEREAS, the officials of Hancock have approached Hennis and requested Hennis to immediately lease its operating authority and to purchase the said operating authority, all with the prior approval of the Interstate Commerce Commission; and

WHEREAS, it is the desire of all the parties hereto to enter into this agreement, subject to the approval of

the Interstate Commerce Commission, and to make application to said Commission for authority for Hennis to lease for a period of one year, with option to renew for another year, the operating authority, and simultaneous therewith to make application to said Commission for emergency temporary authority to lease the said authority, and to make application to said Commission for Hennis to buy all the operating authority of Hancock and to consolidate said operating authority with the authority now held by Hennis.

Now, therefore, in consideration of the premises and the mutual agreements, and of the warranties and representations herein contained, it is agreed between the parties hereto as follows:

1. APPROVAL OF THE INTERSTATE COMMERCE COMMISSION.

1.1. The transactions agreed to herein are subject to the approval of the Interstate Commerce Commission and other regulatory bodies having jurisdiction thereof, and no liability shall arise hereunder until said Commission issues an order granting temporary authority as requested in the application of the parties.

2. PROPERTY BEING LEASED, SOLD, AND PURCHASED AND THE PRICE THEREOF.

2.1. The property being leased and sold by Hancock and leased and purchased from Hancock by Hennis is all of the interstate operating authority owned and held by Hancock, including, but not limited to, the authority granted in Docket No. MC 2-5567, and sub-numbered dockets.

2.2. The price at which Hancock agrees to sell and Hennis agrees to buy the said operating authority is Seven Hundred Sixty-Five Thousand Dollars ($765,000.00), with interest at 8% as hereinafter shown in paragraph 2.3(c).

2.3. Said purchase price is to be paid as follows:

(a) The sum of Twenty-Five Thousand Dollars ($25,000.00) has been deposited in THE AMERICAN BANK AND TRUST COMPANY, South Bend, Indiana, as Escrow Agent as of the date of the signing of this contract. This sum of Twenty-Five Thousand Dollars ($25,000.00) shall be released and paid over to Hancock by the bank within five days from the date Hennis receives notice from the Interstate Commerce Commission of the final order approving the sale and purchase of all the interstate operating authority now held by Hancock.

(b) Two Hundred Seventy-Five Thousand Dollars ($275,000.00) cash to be paid as follows: Seventy-Five Thousand Dollars ($75,000.00) within thirty (30) days from the date upon which Hennis receives notice of the final order of the Interstate Commerce Commission approving the sale and purchase of all interstate operating authority now held by Hancock; One Hunderd Thousand Dollars ($100,000.00) within sixty (60) Days from the date of the aforesaid final order; and One Hundred Thousand Dollars ($100,000.00) within ninety (90) days from the date of the aforesaid final order.

(c) The balance of the purchase price; principal sum of Four Hunderd Sixty-Five Thousand Dollars ($465,000.00), plus interest of Two Hunderd Thirty-Five Thousand Dollars ($235,000.00) said interest having been computed at the rate of 8% per annum for the first five year period from date of the note, with all of the interest on the principal sum to be paid within five years from the date of the note, with no interest on the unpaid balance thereafter; shall be evidenced by a note of Hennis to be payable in seventy eight (78) monthly installments, the first seventy seven (77) monthly installments to be in the sum of Nine Thousand Dollars ($9,000.00) and the last monthly installment to be in the sum of Seven Thousand Dollars ($7,000.00); the first installment shall become due and payable thirty (30) days from the date of final approval by the Interstate Commerce Commission of the purchase of said operating authority; said note and unpaid balance thereon to be secured by a chattel mortgage on the said operating authority.

2.4 It is mutually agreed between the parties hereto that the above described note evidencing the unpaid balance of the purchase price of said operating authority shall be dated as of the date of the consummation of the sale and purchase pursuant to final order of the Interstate Commerce Commission authorizing the same.

3. HANCOCK COVENANTS, AGREES, REPRESENTS AND WARRANTS:

3.1. That Hancock owns and operates Certificate No. MC 2-5567 issued by the Interstate Commerce Commission, and that Hancock has a right to sell the same subject to the approval of the Interstate Commerce Commission, that there are now no proceedings pending before the Interstate Commerce Commission affecting said certificate of operating authority and that if any such proceedings are instituted, Hancock will have said proceedings dismissed and finally terminated so as not to in any way adversely affect said certificate.

3.2 Hancock represents and warrants that no provisions in the Articles of Incorporation or By-Laws of Hancock, and no law or regulation of the state of its incorporation prohibits, limits, or otherwise inhibits the right or authority of Hancock to execute this agreement and to sell its operating authority, and that the execution of this agreement and the lease and sale of its said operating authority is in accord with said Articles of Incorporation and By-Laws and by authority of the Board of Directors and Stockholders of Hancock.

3.3. Hancock covenants to furnish promptly to Hennis all information, records and other materials required in connection with the completion and filing of applications to the Interstate Commerce Commission and any and all other regulatory agencies having jurisdiction for the approval of the transactions covered by this agreement, to execute all applications and all other papers necessary to carry out this agreement or required or useful in connection with said applications, and to cause their officers, directors and agents to exercise their best efforts to secure the approval of the Interstate Commerce Commis-

sion, and of any and all other regulatory agencies having jurisdiction, to all the applications filed.

3.4. Hancock agrees that it is for the best interest of all parties concerned that the said operating authority of Hancock be leased to and operated by Hennis as quickly as possible under emergency temporary authority granted by the Interstate Commerce Commission, and that it is necessary and for the best interest of all parties concerned that Hennis pay installements of rent for the use of said franchise as hereinafter provided.

3.5. Hancock represents and warrants that there are no known violations of any state or federal laws or rules and regulations of the Interstate Commerce Commission which will lead to any disciplinary action that will in any way adversely affect the certificate of public convenience and necessity which is being sold hereunder.

3.6. Hancock covenants, warrants and represents to Hennis that the copies of the operating authority of Hancock which it has furnished to Hennis, said authorities having been issued by the Commission in Docket No. MC 2-5567 and sub-numbered dockets, is presently effective and in good standing, and free from any liens and encumbrances of any kind, and that there are no suits, complaints or other proceedings in existence or threatening which, if determined adversely to Hancock, would diminish the scope or value of said operating authority, and that it will, upon the granting of final permanent authority by the Interstate Commerce Commission, transfer said operating authority to Hennis.

3.7. Upon receipt of a copy of the order from the Interstate Commerce Commission granting authority for Hancock to lease the said operating authority to Hennis, Hancock covenants and agrees as follows:

(a) Within five (5) days from the receipt of a copy of said order, Hancock shall lease all of its interstate operating authority to Hennis, said lease to be upon the following terms and conditions:

(1) That Hennis shall pay Hancock a monthly rental of Two Thousand Dollars ($2,000.00) per month for the

operating authority, said monthly payments to be made by Hennis to Hancock beginning as of the date of consummation of the lease agreement and each thirty (30) days thereafter until the lease terminates.

(2) The lease on the said operating authority to remain in full force and effect until such time as the parties hereto receive from the Interstate Commerce Commission a final order on the BMC 44 Application to be filed in accordance herewith for authority to sell and transfer said interstate operating authority to Hennis.

(b) To cooperate with Hennis to the end that the transfer of the operating authority may be transferred from Hancock to Hennis without any loss of service to the shipping public.

4. HENNIS COVENANTS AND AGREES AS FOLLOWS:

4.1. Hennis covenants and agrees to cooperate with Hancock in the preparation, filing and prosecution of the applications to the Interstate Commerce Commission and any other regulatory bodies having jurisdiction for authority to consummate the transaction, which applications are referred to hereinabove.

4.2. Hennis covenants and agrees to furnish all information required of it in the preparation of said applications to said Commission and to join with Hancock in the preparation, execution, filing and prosecution of all applications to said Commission to obtain approval and authorization for all the transactions provided for herein.

4.3. In the event temporary authority is granted by the Interstate Commerce Commission for Hennis to lease the operating authority of Hancock, Hennis covenants and agrees as follows:

(a) To lease the operating authority from Hancock and to pay the rent therefor specified in Paragraph 3.7 (a) (1).

4.4. In the event the Interstate Commerce Commission approves the permanent application for Hennis to purchase the operating authority of Hancock, then, and in that event, Hennis covenants and agrees as follows:

(a) Within thirty (30) days following the receipt of the final order of the Interstate Commerce Commission approving the sale and purchase of said interstate operating authority, to purchase the same and to execute notes evidencing the balance of the purchase price as herein provided.

4.5. In the event the Interstate Commerce Commission does not approve the permanent application of the parties hereto for Hennis to purchase the interstate operating authority of Hancock, then, and in that event, Hennis and Hancock covenant and agree as follows:

(a) If there are any new facts, information or evidence, which in the opinion of Hennis and/or Hancock should be submitted to said Commission, the parties hereto shall petition the said Commission for reconsideration and/or rehearing and Hennis shall have the right to continue to lease the operating authority of Hancock hereunder as long as permitted to do so by said Commission.

(b) In the event no petition for reconsideration or rehearing is filed by the said parties, or upon final order of said Commission on said petition disallowing the purchase and sale of said interstate operating authority, the lease of said properties hereinabove provided for shall terminate at the convenience of Hennis within thirty (30) days from the receipt of the final order of the Interstate Commerce Commission.

5. MISCELLANEOUS PROVISIONS

5.1. It is mutually understood and agreed between the parties hereto that they shall join in an application to the Interstate Commerce Commission and all other regulatory bodies having jurisdiction, for Hennis to lease and purchase the interstate operating authority of Hancock.

5.2. It is mutually agreed between the parties hereto that they will cooperate in the prompt furnishing of all information, records and other materials required in connection with the completion, filing and prosecution of all of said applications for temporary authority and for permanent authority herein referred to and that they will

exercise their best efforts to secure the approval of said Commission of all said applications.

5.3. In the event temporary authority is not granted by the Interstate Commerce Commission for Hennis to lease the operating franchise of Hancock, this agreement and the permanent application shall continue in full force, but Hennis may on five days' written notice to Hancock and to the Interstate Commerce Commission fully terminate and dismiss this agreement and the permanent application, without liability.

5.4. It is mutually agreed between the parties hereto that in the event the Interstate Commerce Commission should impose any objectionable conditions or limitations upon the operating rights of Hancock, which do not presently exist in said operating rights, that Hennis may elect to terminate this agreement without liability to it and may refuse to consummate any order of the Interstate Commerce Commission which may be entered pursuant to the applications to be made under the provisions of this agreement.

5.5. In the event the Interstate Commerce Commission should require cancellation or revocation of any portion of the operating rights of Hancock as a condition precedent to the consummation of an order of said Commission, that the purchase price shall be reduced in direct ratio to the number of miles so ordered to be cancelled or revoked.

5.6 On or about May 4, 1954 Mr. Sheldon A. Key was appointed Trustee in proceedings for reorganization of Hancock-Trucking, Incorporated, in the United States District Court, Southern District of Indiana, Evansville Division. This reorganization proceedings is still pending in the aforesaid United States District Court. In the event it is determined that this contract for the sale of the operating authority of Hancock to Hennis requires the consent of the United States District Court and the Trustee appointed by said Court, Hancock will immediately undertake to procure from said Court an order approving and ratifying this contract of purchase.

5.7. Nothing contained in this agreement shall be deemed or construed to be a joint venture or partnership between the parties hereto.

5.8. This agreement may not be assigned by either of the parties hereto without the prior written consent of the other party, but it is binding and effective upon the successors and assigns of the parties hereto.

5.9. The parties hereto mutually agree that the proper and appropriate corporate action shall be taken by the Stockholders and Directors of Hennis and Hancock.

IN WITNESS WHEREOF, Hennis Freight Lines, Inc. and Hancock-Trucking, Incorporated, have caused this instrument to be signed and the corporate seals attached, by their proper officers, who have first been duly authorized by their Board of Directors, all as of the day and year first above written.

HENNIS FREIGHT LINES, INC.

By /s/ S. H. MITCHELL
President

ATTEST:

/s/ B. C. BRANDON
Secretary

[CORPORATE SEAL]

HANCOCK-TRUCKING,
INCORPORATED

By /s/ JAMES H. LAHEY
President

ATTEST:

/s/ ROBERT M. SHULZ
Secretary

[CORPORATE SEAL]

FORM 2317

U. S. Treasury Department—Internal Revenue Service

PROOF OF CLAIM FOR INTERNAL REVENUE TAXES

Consolidated in Lieu of Supplementals Dated 9-25-62 and 11-9-62

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

Docket No. 1569-B

Filed Mar 8 1963, Paul A. Pfister, Referee in Bankruptcy

IN THE MATTER OF:

HANCOCK TRUCKING, INC., Evansville, Indiana

TYPE OF PROCEEDING:

Reorganization Chapter X
Claim of the United States for Internal Revenue Taxes

The undersigned officer of the Internal Revenue Service, a duly authorized agent of the United States in this behalf, being duly sworn, deposes and says that:

1. HANCOCK TRUCKING, INC., is justly and truly indebted to the United States in the sum of $880.18 with interest thereon as hereinafter stated;

2. The said debt is for taxes due under the internal revenue laws of the United States as follows:

Kind of Tax And Period		Reference No.	Amount Due	Remarks	Date Tax Lien Arose
Unemployment Tax					
Adnl. 1960	ME	8-865010	$492.28	American Leasing Co.	8-3-62
Adnl. 1961	ME	12-865218	83.54	American Leasing Co.	12-28-62
1962		6-880012	304.36	Hancock	
			$880.18	Trucking, Inc.	6-1-62
Claim dated 8-3-62—			$376,768.61		
Claim dated 3-6-63—			880.18		
			$377,648.79		

3. No part of said debt has been paid and the same is now due and payable at the Office of the District Director of Internal Revenue;

4. There are no set-offs or counterclaims to said debt;

5. Except for the statutory tax liens which arose on the dates above stated, the United States does not hold, to the deponent's knowledge or belief, any security or securities for said debt;

6. No note or other negotiable instrument has been received for said debt or any part thereof, nor has any judgment been rendered with respect to said debt, and

7. Said debt has priority and must be paid in full in advance of distribution to creditors as and to the extent provided by law:

IN BANKRUPTCY ACT PROCEEDINGS see Sections 64, 77e, 199, 337(2), 455, and 659 of the Bankruptcy Act (11 U.S.C. 104, 205(e), 599, 737(2), 855, and 1059).

IN OTHER PROCEEDINGS see Section 3466 of the Revised Statutes (31 U.S.C. 191). Also, attention is invited to Section 3467 (31 U.S.C. 192) with respect to the personal liability of any executor, administrator, or other person who fails to pay the claims of the United States in accordance with their priority.

March 6, 1963

/s/ HELEN C. WILDE

Chief, Special Procedures Section
Office of the District Director of Internal Revenue

P.O. Box 348
Indianapolis, Indiana

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

Modification Agreement

Agreement entered into this 20th day of June, 1967 by and between Hennis Freight Lines, Inc. (hereinafter referred to as Hennis) and Sheldon A. Key, as trustee in proceedings for reorganization of Hancock-Trucking, Incorporated (hereinafter referred to as trustee.)

PREMISES

1. Hancock-Trucking, Incorporated (hereinafter referred to as "Hancock") was incorporated under the laws of the State of Indiana on June 23, 1933, and by virtue of certain rights which came to it under the Motor Carrier Act, 1935, and through acquisition of additional rights through purchase and by extension applications to the Interstate Commerce Commission became an active and rather substantial carrier operating in interstate commerce under and by virtue of outstanding certificates of public convenience and necessity issued by the Interstate Commerce Commission in MC-25567 and various subs thereunder.

2. On May 3, 1954, in the United States District Court, Southern District of Indiana, Hancock filed a debtor's petition for reorganiaztion under Chapter X of the Bankruptcy Act, Cause # 1569-B. The court approved the petition and appointed Sheldon A. Key trustee with authority to continue the operations of Hancock and to submit a plan of reorganization. A plan of reorganization was confirmed, and on June 1, 1958, all properties of Hancock were transferred to the reorganized debtor.

3. On February 15, 1962, an agreement was entered into between Hennis and Hancock for the sale by Hancock and the purchase by Hennis of the interstate operating rights of the debtor. A joint application was filed with the Interstate Commerce Commission seeking approval of transfer of such rights under Sec. 5 of the Interstate Commerce Act. Simultaneously with said filing, an ap-

plication was filed by said parties under Sec. 210a (b) of the Interstate Commerce Act for lease by Hennis of the operating rights of Hancock at a monthly rental of $2,000.00 pending final determination of the Sec. 5 application. The application under Sec. 210a (b) was approved March 2, 1962, and Hennis has continuously since on or about March 10, 1962, conducted operations as a common carrier in interstate commerce under the rights leased from Hancock.

4. On March 5, 1962, a creditors' petition was filed in the reorganization court praying that the trustee retake the property of the debtor. On March 15, 1962, this court entered its order directing Sheldon A. Key, as trustee, to retake possession and custody of all the assets and property of the debtor.

5. On August 10, 1962 the reorganization court entered its order affirming the contract of sale between Hennis and Hancock referred to in paragraph 3 above and authorized the trustee to take all steps necessary to consummate the sale.

6. The application under Section 5 of the Interstate Commerce Act was referred to a hearing examiner who submitted a recommended report and order on April 15, 1964, pursuant to which the examiner recommended that the transaction proposed by the parties be approved providing however for a modification imposing certain restrictions on shipments originating from and destined to Detroit, Michigan.

7. The Interstate Commerce Commission, Division 3 issued its decision and order dated March 11, 1965 approving the hearing examiner's report for all intents and purposes.

8. On October 15, 1965 the trustee filed a complaint to enjoin, set aside and annul orders of the Interstate Commerce Commission. This matter came on for hearing before a three judge court and final judgment and decree was entered on January 12, 1967 denying the complaint, dismissing the same and sustaining the order of the Interstate Commerce Commission.

9. The basic contract entered into by and between Hennis and Hancock provides for Hennis to purchase

the interstate operating rights of Hancock for $1,000,000.00 under a deferred method of payment; the contract further provides that should the Commission require cancellation of any portion of the rights to be acquired by Hennis from Hancock, as a condition for approval, the purchase price is to be reduced in direct ratio to the number of miles embraced in the cancelled rights.

10. Hennis has contended that in accordance with the terms of the contract the purchase price should be reduced and has set forth the fact that the restrictions imposed gives rise to a reduction in the purchase price under the provisions of the contract. The trustee has contended that there has been no cancellation or revocation of mileage and that no diminution in purchase price should take place.

In consideration of the foregoing premises the parties have entered into this modification.

TERMS

A. The purchase agreement of February 15, 1962 shall be amended so that paragraph two thereof shall read as follows:

"2. PROPERTY BEING LEASED, SOLD, AND PURCHASED AND THE PRICE THEREOF:

2.1. The property being leased and sold by Hancock and leased and purchased from Hancock by Hennis is all of the interstate operating authority owned and held by Hancock, including, but not limited to, the authority granted in Docket No. MC 2-5567, and sub-numbered dockets.

2.2. The price at which Hancock agrees to sell and Hennis agrees to buy the said operating authority is Nine Hundred Thirty Five Thousand Dollars ($935,000.00), inclusive of principal and interest at Six percent (6%) per annum, subject to reduction as hereinafter shown in paragraph 2.3 (d).

2.3. Said purchase price is to be paid as follows:

(a) The sum of Twenty-Five Thousand Dollars ($25,000.00) has been deposited in THE AMERICAN BANK AND TRUST COMPANY, South Bend, Indiana, as Escrow Agent as of the date of the signing of this contract. This sum of Twenty Five Thousand Dollars ($25,000.00) shall be released and paid over to Hancock by the bank within five days from the date Hennis receives notice from the Interstate Commerce Commission of the final order approving the sale and purchase of all the interstate operating authority now held by Hancock.

(b) Two Hunderd Seventy Five Thosuand Dollars ($275,000.00) cash to be paid as follows: Seventy-Five Thousand Dollars ($75,000.00) within thirty (30) days from the date upon which Hennis receives notice of the final order of the Interstate Commerce Commission approving the sale and purchase of all interstate operating authority now held by Hancock; One Hundred Thousand Dollars ($100,000.00) within sixty (60) days from the date of the aforesaid final order; and One Hundred Thousand Dollars ($100,000.00) within ninety (90) days from the date of the aforesaid final order.

(c) The balance of the purchase price in the sum not to exceed Six Hundred Thirty Five Thousand Dollars ($635,000.00) inclusive of principal and interest at six per cent (6%) per annum on the unpaid balances shall be evidenced by a note of Hennis to be payable in seventy eight (78) equal monthly instalments; the first instalment shall become due and payable thirty (30) days from the date of final approval by the Interstate Commerce Commission on the purchase of said operating authority; said note and unpaid balance thereon to be secured by a chattel mortgage on the said operating authority.

(d) Purchase price in the sum of Nine Hundred Thirty Five Thousand Dollars ($935,000.00) inclusive of interest and principal as hereinabove set forth shall further be reduced in the following fashion: the trustee agrees to submit to the reorganization court an amended plan of reorganization which shall provide inter alia for the payment of all administration and prioroity claims in full without interest and for the settlement and satisfaction of all unsecured claims whether for goods sold and delivered, cargo loss and damage or otherwise, by the payment of twenty percent (20%) of the face amount of said claims; said plan shall also provide that all funds in the hands of the trustee together with the consideration to be furnished under this contract shall be utilized for the carrying out of said amended plan of reorganization and any funds in excess of the amounts needed to satisfy the consideration for said amended plan of reorganization shall redound to the benefit of Hennis and shall be accordingly deducted from the purchase price by application to the note in the amount of Six Hundred Thirty Five Thousand Dollars ($635,000.00) as set forth in 2.c above and the monthly instalments thereunder reduced accordingly.

2.4. It is mutually agreed between the parties hereto that the above described note evidencing the unpaid balance of the purchase price of said operating authority shall be dated as of the date of the consummation of the sale and purchase pursuant to final order of the Interstate Commerce Commission authorizing the same.

B. All other terms and conditions of the agreement entered into February 15, 1962 by and between Hennis and Hancock shall remain in full force and effect.

C. This agreement shall be subject to the approval of the United States District Court, Southern District of

Indiana in the reorganization proceedings now pending of Hancock.

In witness whereof, the parties have hereunto set their hands and seals all as the day and year first above written.

HENNIS FREIGHT LINES, INC.

By /s/ S. H. MITCHELL
President

ATTEST:

B. C. BRANDON
Secretary

/s/ SHELDON A. KEY,
Trustee in Proceedings for Reorganization of Hancock-Trucking, Incorprated Debtor

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

[Caption Omitted]

TRANSCRIPT OF PROCEEDINGS HAD IN THIS MATTER ON SEPTEMBER 7, 1967, BEFORE THE HON. WILLIAM E. STECKLER IN INDIANAPOLIS, INDIANA.

MR. JESSE L. PHIPPS

DIRECT EXAMINATION

QUESTIONS BY MR. BECK:

* * * *

[Tr. 29]

* * * *

17 Q Would you say that the operating authority of Hancock is more valuable today than it was when Hennis originally entered into the temporary authority? A Yes.

* * * *

[Tr. 43]

CROSS EXAMINATION

QUESTIONS BY MR. CLAYCOMBE:

41 Q Mr. Phipps, at the present time you are operating under a lease arrangement, is that correct? A Correct.

42 Q Now, are you operating the full rights of Hancock or are you operating under the restrictions imposed by the I.C.C.? A We're operating the full rights of Hancock at this time.

43 Q You mentioned that at the present time Hennis was making a 1 per cent return on the Hancock revenues. Was that correct? A That is correct, based upon—

44 Q All right. What are the gross revenues against which this 1 per cent is to be applied? A We are attributing approximately $15,000,000 of our present annual revenue volume to the Hancock authority.

45 Q That's this year, or 1966? A For 1966. And 1967 will be comparable to 1966. It will be about the same.

46 Q Then your profit for the year 1966 on the Hancock rights was 1 per cent of $15,000,000. A That is correct.

[Tr. 44]

47 Q Could you give us the gross revenues for the years 1962 through 1965 that you attributed to the Hancock rights? A I would have to give you my estimate. I do not have it at hand: 1962 was a period of gearing up and preparing to develop the authority. We would have approximately $2,000,000 revenue in 1962 as a result of Hancock. In 1963 I would estimate approximately $5,000,000 revenue. In 1963 we began a steel—a leased operation, and in steel. In 1964 I would estimate nine to $10,000,000 of revenue. 1965 ran thirteen-fourteen million. In 1966, around 15,000,000.

48 Q And you expect no further increase then in '67? A No, not in light of conditions, economic conditions and so forth that have existed in 1967.

49 Q Now, generally speaking, have rights increased in value from the year 1962 to the present time? A In my opinion, along with most other things, yes, they have.

50 Q What in your opinion has been the increase in the value of the Hancock rights from 1962 to the present time? A I can answer that from the standpoint of Hennis Freight Lines. At the time of course that we acquired the right to control the authority it had no business. With the business that Hennis has generated on the authority, having developed it to the point where we have passed beyond the break-even point, I think the

authority is worth roughly the investiment that we presently have, insofar as Hennis is concerned, remembering that the business that is on the authority is in Hennis' name: I'd say approximately $3,000,000.

51 Q That would be the present day value of the rights? A To Hennis Freight Lines.

[Tr. 45]

52 Q And how much would it be to the hypothetical trucking company that might want to purchase them? A Here again it would depend, in my opinion, upon the framework that it has. Do they have terminal facilities in the Hancock area of operation? Or do they have to come in and start from scratch insofar as creating a framework? It would be a little difficult for me to give you my opinion without having some information on the operations of the potential purchaser.

[Tr. 46]

* * * *

[Tr. 51]

73 Q Well, let's take Hennis, the overall Hennis operation: How much profit did Hennis make in 1961? Before you got involved with Hancock A May I be excused? I've got a publication in my brief case that would give us this information.

[Tr. 52]

THE COURT: Yes.

(The witness secures a volume.)

A This publication is Tring's Red Book, which is a publication of financial results as reported to the Interstate Commerce Commission by motor carriers. In 1962, on $26,800,000, Hennis netted, after income taxes, $850,000.

74 Q After income taxes? A Yes, sir.

75 Q What about '61? A I don't have '61 available.

76 Q Well, in 1962 you had integrated with the Han-

cock operation. A Right, but it was late '62 before we got geared up and really started expending maximum effort.

77 Q Then would you say that there were no appreciable losses attributable to the Hancock operation in 1962? A I would estimate between two and two hundred and fifty thousand dollars as a result of the Hancock operations in 1962.

[Tr. 53]

78 Q Between—? A Two and two hundred and fifty thousand dollars.

79 Q Between two thousand and two hundred and— A No, no, two hundred thousand and two hundred and fifty thousand dollars.

80 Q A loss. A Yes.

81 Q There is no way that we can get a period to compare, then, before the Hennis integrated with Hancock, that's what I'm trying to get to. A Well, I don't have details with me of 1961. Hennis operated at approximately 92 per cent operating ratio. The—for the year preceding the acquisition of Hancock, which would have been 1961,—I'm sorry, I don't have the figure. I've got some differentials here but I do not have the exact figure with me.

82 Q All right. You have an $850,000 profit after taxes in the year 1962. A Correct.

83 Q How about '63? A In 1963, on thirty-six and a half milion dollars revenue, we had a million two net income after income taxes.

[Tr. 54]

84 Q That was the first full year of integration with the Hancock rights, is that correct? A Right. And I might point out, too, that in 1963 we show a negative income tax of a hundred and twenty-one thousand dollars. In 1963 we did make major additions to our equipment fleet, and the result being a large investment credit as well as excessive amount of depreciation which we claim for tax purposes.

MR. BECK: Excuse me, Mr. Claycombe, I do have something here if you want 1961 that might refresh the witness' recollection.

MR. CLAYCOMBE: Sure.

(Mr. Beck hands documents to the witness.)

THE WITNESS: This is 1962.

MR. BECK: Isn't that December, '62? Oh, I beg your pardon. I'm sorry.

85 Q Now, can you give us the figure for 1964? A 1964, on fourty-four and a half million dollars gross, Hennis netted $573,000.

86 Q And '65? A In '65, on a fifty-one million dollar gross—

THE COURT: Fifty-one?

THE WITNESS: Yes, sir.

THE COURT: All right?

THE WITNESS: Hennis netted a million two hundred and sixty-nine thousand dollars.

87 Q Now, can you tell us why the net was—in 1964, seems to be somewhat off of the curve? A In 1964?

88 Q Yes. You went eight hundred fifty thousand, and a million two; then dropped down to five hundred seventy-three, and back up to a million two. A Well, here again our income tax provision —one reason I pointed out a negative income tax provision for the year 1964 of a hundred and twenty-one thousand dollars? The Interstate Commerce Commission gives no recognition to deferred income taxes, whereas generally accepted accounting principles require that a provision be levied against current year earnings, with the deferred taxes being carried on your statement as a reserve. Because of the I.C.C. accounting requirement you do get a distortion in net income after taxes.

89 Q Well, can you give us the figures then that won't be distorted? What I'm trying to get to, Mr. Phipps, is the overall performance of your company during the years that you say you lost $2,000,000. A All right, if I may—I believe if I were to give you the earnings before income taxes it would eliminate this distortion that is being brought about due to I.C.C. Regulations.

[Tr. 56]

90 Q All right. A In 1962 Hennis Freight Lines earned a million nine hundred fifty thousand dollars before income taxes. In 1963, before income taxes, one million one hundred thousand dollars. In 1964, five hundred and seventy-five thousand dollars. In 1965, one million six hundred twenty-six thousand. In 1966, one million four hundred ninety-four thousand. And in 1966 this one million four hundred ninety-four thousand was earned on a gross revenue of $56,453,000.

91 Q Were there factors other than the acquisition of the Hancock rights which substantially affected the net income of the company? A In 1964 we made an acquisition, adding operating authority in the New England States area to the Hennis operation. That did have some effect on 1964. We made that acquisition in late August of 1964.

[Tr. 57]

MR. CLAYCOMBE: No further questions.

• • • •

[Tr. 60]

MR. THOMAS W. ANDREWS

DIRECT EXAMINATION

QUESTIONS BY MR. BECK:

• • • •

[Tr. 61]

8 Q How long have you been employed by McLean Trucking Company? A Twenty years.

9 Q During your service with McLean Trucking have you had occasion to be involved in the acquisition of any operating authorities? A Yes.

10 Q And have you had occasion to value operating authorities for the purposes of acquisition, either by McLean or for other companies? A Yes, I have been a party with my company in evaluating various authorities.

11 Q Were you involved in the acquisition of Carolina Motor Express by McLean? A Yes.

[Tr. 62]

12 Q Were you involved in the acquisition of Hayes Motor Freight Lines? A Hayes Freight Lines, Inc., yes.

13 Q And have you had occasion to review the certificate of authority issued by the Interstate Commerce Commission to Hancock Trucking, Inc.? A Yes.

14 Q Would you say that the Carolina Motor Express or Hayes, were somewhat comparable to the area covered by Hancock? A Hayes Freight Lines is practically an overlay of the Hancock operation.

15 Q Have you had an opportunity to review the Hancock authority and make a determination as to what the value of that authority would be to an outside purchaser, if one were available as of today? A Yes, I have looked at it and arrived at a figure of $850,000.

16 Q And on what do you base that figure? A Well, the authority is, as you have described in the central states, it has now certain restrictions placed against it, in very key market areas, and the authority had gone down to the point of nothing. And that's the basic reasons for my answer.

[Tr. 63]

17 Q You've heard the testimony of Mr. Phipps in Court. A Yes.

18 Q Would you say that the valuation of approximately $900,000 to be paid by Hennis for this operating authority is a fair and reasonable one? Including the stretch-out—the terms including principal and interest of the $900,000? A In my opinion it is an equitable offer, including the stretch-out, because it's basically a common practice to stretch out payments in this type of a transaction.

MR. BECK: No further questions.

* * * *

MR. SHELDON A. KEY.

DIRECT EXAMINATION

QUESTIONS BY MR. BECK:

* * * *

[Tr. 83]

11 Q In August of 1962 you filed a petition of course for the approval of the contract for the sale by Hancock to Hennis, and at that particular time you testified and you submitted in your petition that the sale was reasonable, and it was approved by the Court. A Yes.

12 Q Since that time you have presented a petition to the Court, at the present time, before the Court today on a hearing, for a modification of that original purchase price due to the restrictions imposed by the Interstate Commerce Commission. A That's right.

13 Q Would you tell us the negotiations that you had with representatives of Hennis relating to the reduction of purchase price? A Well, several counsel and myself have had, I'd say, several months of negotiations back and forth in regard to the purchase price since the Interstate Commerce Commission restricted the rights. Of course the Trustee was trying to get as much as possible for the creditors, and we tried, as I think it was my duty to try,

[Tr. 84]

to try to get as much as possible. Although knowing in my own mind that just the fair thing would have to be that all the time that Hennis would have had to be given consideration on the original purchase price, because of the striking out of restricting of the rights in the Detroit area.

14 Q Now, do you consider the final outcome as presented here today—and you've familiarized yourself with Trustee's Exhibit 1 which has been entered into evidence—do you believe that that purchase price is a fair one under the terms and conditions as they exist? A I believe it is fair. There's never been any time when these rights were not—had no ceased operation on them and Hancock was doing six million a month in previous times, we were—the highest offer ever made for those rights was $650,000. And that was not put in writing by anybody, but it was discussed, $650,000 when I was operating Hancock and was doing six million a month.

15 Q You don't mean six million a month, do you? A I mean six million a year, pardon me.

16 Q You have submitted a plan of reorganization based upon the amended agreement or modified agreement for the purchase by Hennis of the operating authority. In your opinion is that plan fair, equitable and feasible? A I think it's fair and it's equitable and it's feasible. I think it's feasible because it takes care of these general creditors who are small, and will have to be paid in small amounts so that that can be gotten out of the way. I think it's fair because it does secure those who wait for payment, the Government and other taxing units, and they'll be secured by a mortgage on the operating rights. Which I think is very good security.

MR. BECK: No further questions.

MR. WELCH: I have no further questions, Your Honor.

[Tr. 85]

THE COURT: Mr. Boyle?

MR. BOYLE: If I may ask one question, Your Honor:

CROSS EXAMINATION

QUESTIONS BY MR. BOYLE:

17 Q Mr. Key, are you familiar with this Exhibit, Trustee's Exhibit No. 1? A Do I agree with that?

[Tr. 86]

18 Q No, are you familiar with that? A Oh, yes.

19 Q Could you give me a rough recount of the estimated administrative expenses? A Well, I don't know all the—maybe all the attorneys involved in this proceedings over the year who may come in with claims. But that takes in consideration the counsel for the Trustee's fees, the Trustees, the accountants, the special attorneys for the Trustee, and all other administration expenses that the Trustee would have in that regard.

THE COURT: I don't believe the question was answered. He wants a breakdown—

THE WITNESS: He wants a breakdown?

THE COURT: Isn't that what you asked?

20 Q If you could give me a breakdown, money-wise, Mr. Key, I'd appreciate that. A I don't have it with me. I mean I went over that when we estimated it, but I don't recall the breakdown right now.

21 Q Could you tell me what has been estimated for the Trustee? A I think at the time it was estimated something like $54,000.

[Tr. 87]

22 Q In addition to what you have received— A No, including what we received.

23 Q And how much for the Trustee's attorney? A How's that?

24 Q How much for the Trustee's attorney? A I said I don't have those figures with me, and I'd hate to testify to them, because I don't think—. Oh, I might, let's see—(examines documents) As I recall, the total amount estimated was in the neighborhood of $97,500.

25 Q And that includes what has been paid heretofore during the second— A That includes what's been paid before.

26 Q You say it did include what's been paid? A Includes, has to, because you've only got $90,000 which you're talking about paying out.

MR. BOYLE: I have no further questions.

THE COURT: This balance you estimate is approximately 10 per cent then of the total purchase price.

THE WITNESS: Approximately, yes.

[Tr. 88]

THE COURT: For all administrative expenses.

THE WITNESS: Yes, I don't know what they all are right now, I don't have—

THE COURT: The referee's salary and expense fund—

THE WITNESS: Yes, we will have some for that, Judge. The referee.

THE COURT: It will be relatively insignificant compared to the other costs.

All right. Well, that remains to be ruled on by the Court.

MR. BOYLE: I have no further questions.

THE COURT: Any further questions? Mr. Claycombe?

MR. CLAYCOMBE: No, sir.

MR. FLYNN: No questions.

THE COURT: Do you have any further questions, Mr. Beck?

MR. BECK: No, I have no further questions.

THE COURT: All right.

(Witness excused)

[Tr. 89]

THE COURT: I have one question: Has the accounting firm been paid as a part of the operating expense?

MR. BECK: No, sir. No, they have fees coming to them. They were paid the last time—that's included in that $90,000, Your Honor. There are accountants' fees, referee's salary and expense fund, counsel, special counsel; there are some, in addition to the counsel here, there are some counsel who should have fees with respect to some—they'll be minor fees, but there will be some with respect to proceedings in the Northern District. I don't believe they've been paid in full. And I'm not sure about the Pittsburgh lawyers, I think they may have received their payment in full. And as well as the Louisville attorneys, I thought had another minor bill coming to them. I don't know about the attorneys for the debtor. They have never shown up, so I would doubt very much that they're going to appear for fees, although they might at the time of the presentation.

* * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

[Caption Omitted]

ORDER APPROVING MODIFICATION AGREEMENT OF SALE OF OPERATING RIGHTS AND APPROVAL OF AMENDED PLAN OF REORGANIZATION

At Indianapolis, in said district, on the 21st day of September, 1967.

A hearing having been held on the 7th day of August, 1967, pursuant to the order of this court dated July 3, 1967, on the petition of the trustee to approve modifica-

tion agreement of sale of operating rights and on the amended plan for the reorganization of Hancock Trucking, Inc., the above-named debtor, prepared and filed herein by Sheldon A. Key, trustee of said debtor, and for the consideration of any objections which might be made, or of such amendments or plans as might be proposed by said debtor or by any creditor or stockholder herein, and notice of said hearing having been given as required by Sec. 171 of the Bankruptcy Act and in accordance with the said order of July 3, 1967; and Ohio Fast Freight, Inc., a creditor of said debtor, having filed objections to the approval of said plan; and the said hearing having been adjourned until August 21, 1967, and thereafter continued by order of the court until September 7, 1967, and a further hearing having been held thereon on September 7, 1967; and at said hearing Sheldon A. Key, trustee in proceedings for reorganization herein, having appeared in person and by Sigmund J. Beck of Bamberger & Feibleman, his counsel, and Ferdinand Born, special counsel for the trustee; and Ohio Fast Freight, Inc. having appeared by Robert Claycombe of Claycombe & Claycombe, its attorneys; the District Director of Internal Revenue and the United States Attorney having appeared by Bernard J. Boyle, Assistant Regional Counsel; and the State of Ohio having appeared by William F. Welch of McHale, Cook & Welch, its attorneys; and Hennis Freight Lines, Inc. appearing by A. W. Flynn of York, Boyd & Flynn, its attorneys; and the court having considered the evidence given in these proceedings.

Now upon the trustee's petition aforesaid, and upon the amended plan for the reorganization of Hancock Trucking, Inc., said debtor, prepared and filed by Sheldon A. Key, trustee of said debtor, and all the proceedings had before me at the said hearings, and the court being of the opinion that said plan, as amended, complies with the provisions of Sec. 216 of the said Act, and is fair and equitable, and feasible, and the court finding that the debtor is insolvent; it is

ORDERED: That the modification agreement entered into between Hennis Freight Lines, Inc. and Sheldon A.

Key, as trustee for Hancock Trucking, Inc., for the reduction of the purchase price relating to the sale of the interstate operating authority is approved; and it is further

ORDERED: That the said amended plan for the reorganization of Hancock Trucking, Inc., the above named debtor, prepared and filed by Sheldon A. Key, trustee of said debtor, be, and it hereby is approved; and it is further

ORDERED: That for purposes of determination of the acceptance of said plan, creditors in Classes 7, 8 and 9 having been determined to be all holders of general unsecured claims and to be treated on a parity, shall be consolidated into one class in determining whether said class of creditors have accepted the plan; and it is further

ORDERED: That Hancock Trucking, Inc., said debtor, is insolvent, and that stockholders accordingly are not affected by the plan of reorganization; and it is further

ORDERED: That October 31, 1967, be, and it hereby is, fixed as the last day of a time within which creditors herein affected by the said plan may accept the same in writing filed with Sheldon A. Key, trustee herein, 508 Union Federal Building, 45 North Pennsylvania Street, Indianapolis, Indiana, and such filing with such trustee shall be deemed filing in this court; and it is further

ORDERED: That the summary of the said plan annexed hereto, marked Exhibit "A" and made a part hereof, be, and it hereby is, approved as the summary required by Sec. 175 (1) of the said Act; and it is further

ORDERED: That within twenty (20) days after the entry of this order, Sheldon A. Key, said trustee, shall transmit by mail to each creditor of the said debtor who is affected by the said plan, and who has filed his claim in these proceedings, or whose claim has been scheduled by the trustee, at his address appearing upon his claim filed, or upon the debtor's books, a copy of the said plan together with a copy of the summary thereof herein ap-

proved, a copy of the notice hereto annexed, marked Exhibit "B" and made a part hereof, and appropriate forms for acceptance; and it is further

ORDERED: That the 17th day of November, 1967, at 9:30 O'Clock, A.M., at Room 201, United States Court House, Federal Building, Indianapolis, Indiana, is fixed as the time and place for hearing upon confirmation of said amended plan of reorganization and objections to confirmation of said plan, if any, and for the hearing under Sec. 236 (2) of the said Act, if confirmation of the said plan is refused.

WILLIAM E. STECKLER
United States District Judge

[Distribution omitted]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

[Caption Omitted]

EXHIBIT "A"

SUMMARY OF TRUSTEE'S AMENDED PLAN OF REORGANIZATION

The amended plan for the reorganization of Hancock Trucking, Inc., debtor in the above proceedings, provides in summary as follows:

1. The United States of America, the Gross Income Tax Division of the State of Indiana, the County of Vanderburgh of the State of Indiana, and the Department of Taxation for Highway Use Taxes of the State of Ohio shall receive in full satisfaction of their claims

ten per cent (10%) in cash within six (6) months from the date of confirmation, and the balance of indebtedness in full, exclusive of interest, in seventy-eight (78) equal monthly installments.

2. Holders of claims for wages earned within three (3) months prior to March 5, 1962, shall be paid in cash within six (6) months from the date of confirmation.

3. All other taxing authorities shall be paid in cash in full within six (6) months of confirmation.

4. The holders of all general unsecured claims, including but not limited to, holders of cargo loss and damage claims, freight and overcharge claims, personal injury claims, goods sold and delivered, services rendered, and others that have been allowed as general unsecured claims in these proceedings shall receive twenty per cent (20%) of their claims in cash within six (6) months from the date of confirmation.

5. The court has found that the debtor is insolvent so that no provision is made for stockholders.

6. All executory contracts, including leases of real estate, are rejected.

7. All costs and expenses of administration and other allowances shall be paid prior to the payment of claims to creditors.

8. The trustee, pursuant to due authority and approval of the court, has sold the interstate operating authority to Hennis Freight Lines, Inc. for a sum sufficient to pay all of the claims in the manner as hereinabove set forth, the said sum not to exceed Nine Hundred and Thirty-Five Thousand Dollars ($935,000.00), the final consummation of said sale to await confirmation of the plan of reorganization. The purchase price is to be paid in the following manner: Three Hundred Thousand Dollars ($300,000.00) within ninety (90) days following the final approval of sale, and the balance of the purchase price in seventy-eight (78) equal monthly installments. The balance is secured by a note and chattel mortgage on the operating rights to be transferred. This mortgage will secure the balance of payments to the taxing authorities. For the information of interested

creditors, a statement of assets and liabilities of this estate as of July 31, 1967, is attached.

9. This summary has been approved by the court.

DATED this ..... day of September, 1967.

SHELDON A. KEY
Trustee

BAMBERGER & FEIBLEMAN
Attorneys for Trustee
500 Union Federal Building
Indianapolis, Indiana

HANCOCK TRUCKING, INCORPORATED

STATEMENT OF ASSETS AND LIABILITIES

July 31, 1967

ASSETS

Cash	$ 9,102.25	
Funds, Deposits, Account Receivables, less provisions for losses	25,279.54	
U.S. Treasury Bills	49,433.57	
Prepayments	138.56	
Office furniture and equipment	1,787.39	
Assigned value of operating rights	765,000.00	
		$ 850,741.31

LIABILITIES

Trustee's current liabilities	$ 48.82	
Class 2—United States	378,638.34	
Class 3—State of Indiana Gross Income Tax	31,218.91	
Class 4—State of Indiana, Vanderburgh County	76,650.55	
Class 5—State of Ohio—Use Tax	185,000.00	
Classes 7, 8, 9—General Unsecured Creditors	889,432.88	
Class 1—Wage claims	13,466.97	
Class 6—Other Tax claims	21,008.23	
		$1,595,464.70

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

[Caption Omitted]

EXHIBIT "B"

NOTICE

TO ALL CREDITORS OF
HANCOCK TRUCKING, INCORPORATED:

NOTICE IS HEREBY GIVEN THAT:

1. On the 21st day of September, 1967, the court approved an amended plan for the reorganization of Hancock Trucking, Inc., the above-named debtor, prepared and filed by Sheldon A. Key, trustee of said debtor.

2. In accordance with said order, there is transmitted herewith

(a) a copy of said plan;
(b) a copy of the summary of said plan approved by the Judge;
(c) appropriate form for the acceptance of said plan.

3. By the terms of said plan, all general unsecured creditors whose claims arose for services rendered, goods delivered, cargo loss and damage, freight or overcharge have been classified as Classes 7, 8 and 9. The order approving said plan has consolidated the classes for the purpose of acceptance as general unsecured claimants.

4. Acceptances may be filed in writing in the form enclosed herein by all unsecured creditors affected by the plan on or before October 31, 1967, with Sheldon A. Key, Trustee, Room 508, Union Federal Building, 45 North Pennsylvania Street, Indianapolis, Indiana 46204. Acceptances will be effective only as to creditors who have filed appropriate proofs of claim which have been allowed.

5. Objections to the confirmation of the plan, if any, shall be made in writing and filed with the Clerk of this court at the Federal Building, Indianapolis, Indiana, on or before October 31, 1967.

6. Hearing upon the confirmation of the amended plan of reorganization and objections thereto, if any, will be held at the United States Court House, Federal Building, Indianapolis, Indiana, at _____ o'clock, ___ P. on the _____ day of November, 1967, in the event such plan shall have been duly accepted by creditors affected thereby.

7. If confirmation of said plan is refused, a hearing pursuant to Sec. 236 (2) of the Bankruptcy Act will be held at the aforesaid time and place, and after such hearing or any adjournment thereof, an order will be entered either adjudging said debtor a bankrupt and directing that bankruptcy be proceeded with under the terms of the Bankruptcy Act, or dismissing these proceedings, as in the opinion of the Judge, may be in the best interests of the creditors and stockholders of the debtor.

8. Any dates herein provided may be extended by the court and any hearings may be adjourned from time to time without notice to the debtor, creditors, stockholders or other parties in interest, other than announcement of the adjourned date or dates at the time and place of said hearings.

By order of the court dated the _____ day of September, 1967.

SHELDON A. KEY
Trustee

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

[Caption Omitted]

ACCEPTANCE OF AMENDED PLAN OF REORGANIZATION

The undersigned creditor of Hancock Trucking, Inc., the above-named debtor, whose claim is in the amount hereinafter set forth, which claim has been filed and allowed herein, hereby accepts the amended plan for the reorganization of Hancock Trucking, Inc., debtor, approved by this court as set forth in its order entered on September ....., 1967.

Amount of Claim: $.....

Classification of Claim (check appropriate box):

☐ Class 7—Holders of claims for damages arising out of personal injuries.

☐ Class 8—Holders of claims arising out of cargo loss and damage, freight and overcharge, exclusive of claims previously allowed in the plan of reorganization confirmed on January 31, 1957.

☐ Class 9—Holders of general claims, including goods sold and delivered, services rendered, independent contractor freight and steel haulers, interline accounts, trailer interchange, wage claims other than those included in Class (1) herein, inclusive of claims not fully discharged under the reorganization plan confirmed January 31, 1957, and not otherwise classified.

DATED: ....., 1967.

By.....

.....

(Title)

.....

(Address)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

[Caption Omitted]

NOTICE TO SECRETARY OF TREASURY
TO ACCEPT OR REJECT PLAN

Notice is hereby given that with respect to the claim of the United States for Internal Revenue withholding and highway use tax in the amount of Three Hundred Seventy-six Thousand, Seven Hundred Sixty-eight Dollars and Sixty-one Cents ($376,768.61), and the General Accounting Office claim for overcharge on transportation in the amount of Nine Hundred Eighty-nine Dollars and Fifty-five Cents ($989.55) against the above-named debtor, you are required, not more than ninety (90) days after receipt of this notice, to file in this Court your acceptance or rejection of the Amended Plan for the Reorganization of said debtor approved by this Court on the 21st day of September, 1967, under Section 174 of the Act of Congress relating to Bankruptcy, a certified copy of which Amended Plan accompanies this notice; and upon your failure so to do, your consent to the said Plan shall be conclusively presumed.

Dated this 28th day of September, 1967.

WILLIAM E. STECKLER
Judge
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

Filed Nov 20 1967, 2:29 P.M. 1967, U. S. District Court, Indianapolis Division, Southern District of Indiana, Robert G. Newbold, Clerk.

[Caption Omitted]

NOTICE OF REJECTION OF AMENDED PLAN OF REORGANIZATION OF HANCOCK-TRUCKING INCORPORATED

SUBMITTED BY THE TRUSTEE

Having considered the interest and claims of the United States of America as filed and presented herein for taxes outstanding against the debtor, Hancock-Trucking, Incorporated, and the effect thereon of the amended plan of reorganization approved by this Court in its order of September 21, 1967, I, Fred B. Smith, General Counsel for the Department of Treasury, in pursuance of the provisions and authority delegated to me by the Secretary of the Treasury by Treasury Department Order No. 190, (Revision 2) dated October 23, 1963, and by virtue of Section 199, Chapter X of the Bankruptcy Act (11 U.S.C. 599) do hereby reject such amended Plan of Reorganization with respect to the interest and claims of the United States of America for taxes.

FRED B. SMITH
General Counsel for the
Department of Treasury

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

[Caption Omitted]

TRANSCRIPT OF PROCEEDINGS OF DECEMBER 8, 1967

* * * *

[Tr. 3]

THE CLERK: Number 1569 Bankruptcy; In the Matter of Hancock Trucking, Inc., Debtor.

THE COURT: The Court recalls that this matter was assigned for today as a continued hearing on the order—on the confirmation of the Plan, and of course the Treasury Department notified the Court that it was opposing the plan by reason of the fact that the Plan was not acceptable, inasmuch as the Federal Government was not being paid its tax claim in full prior to payment of certain other classes of creditors.

I believe that is the status of the matter today.

MR. BECK: Yes, your Honor.

THE COURT: Now I'd like to hear from counsel for the Trustee.

MR. BECK: If the Court please, we would like to move to—make two motions.

One: that the testimony taken at the hearing on the approval of the Plan, and the exhibits, be included for this purpose, for this hearing, in view of the shortness of the difference—or rather, the brief lapse of time.

We also wish to state to the Court that the acceptances of creditors in Class 7, 8, and 9 have been received in a total amount of $873,356.71—I beg your pardon, that is in error. The $873,356.71 are the total amount of claims filed and allowed and pending in these proceedings in Class 7, 8, and 9, other than the claims of Wilmark Insurance Agency, National Leasing Corporation, Insurance Corporation of America, which claims were subordinated to the claims of general creditors in these proceedings.

[Tr. 54]

The total number of acceptances amount to $702,-509.42, being in excess of the two-thirds required.

THE COURT: That was $702,000—

MR. BECK: $702,509.42.

And the total amount of the claims allowed and pending, of filed claims, $873,356.71, exclusive of the subordinated claims referred to.

THE COURT: All right.

MR. BECK: I should like to move that on the evidence before the Court, the fact that the acceptances of the only class of creditors which the Trustee submits are affected by the Plan, be confirmed.

The legal memorandum which counsel for the Trustee has supplied to the Court at the time of hearing on the approval of the Plan, we will abide by.

It is our view that the United States has been, under the terms of this Plan, afforded equal security to the amount of its debt at the present time, and we think that it is fair and equitable.

[Tr. 5]

We have no further evidence to present to the Court, other than to make the statement that there has been no deteriorating position in the estate of the Debtor or the affairs of the Trustee since the last hearing.

THE COURT: Very well. I'd like to hear from the Government. Mr. Boyle?

MR. BOYLE: All I can say, your Honor, is that the Secretary of the Treasury has notified the Court of the rejection of the Plan, and there is not much more I can say, other than what the Court has said before.

THE COURT: Well, I have tried to view this matter from a practical point of view, and in view of the whole of the evidence before the Court and the Court's acquaintance with the entire background of this Debtor, I am of the firm feeling that the Government does not stand to lose as a result of the Plan as presently proposed. That is, if the Government were required to take the tax indebtedness due the Government according to the Plan

called for, I cannot believe at this date, nor do I believe that the Court could say that there is a reasonable likelihood in the foreseeable future, or even during the course of the Plan, that the Government's position would be impaired in getting the whole of its claim paid that is allowed under the Plan.

[Tr. 6]

The only thing that I can see that would create any question of law is whether or not the Government's position is being impaired by not being allowed interest on the claim, the balance due. Now, if that should justify appellate proceedings, appeal process, of course this matter could be help [sic] up for some time, but the most that I can see that the Government could gain in that respect would be, first, the use of the whole of the claim, and secondly, perhaps if not, that it be allowed interest on the balance due.

Now, if the Court has expressed any idea here that is not supported either by law—and primarily that is what I have in mind—or by the record as I have seen it and understand it, I'd like to have that pointed out by either of the interested—or any of the interested parties.

MR. BOYLE: Well, the only thing I can add to it, your Honor, is what was set forth in that memorandum.

THE COURT: Yes, I've read that.

[Tr. 7]

MR. BOYLE: I believe the Court is ignoring the priorities, but with the utmost respect to the Court I can understand where you would feel that way in respect to to the general creditors.

My recommendation is known to the Court. Now, whether this ruling would be appealed or not, why, I am not in position to be able to say yet on that.

THE COURT: Very well.

Now, is there anything—Mr. Boyle, do you have any comments in regard to making the record on this proceedings? Are you amenable to the proposal that the Trustee and his counsel make in regard to incorporating the transcript of the evidence, or the record of the prior hearing?

MR. BOYLE: I was over at the last—
THE COURT: In this hearing would you agree to that?
MR. BOYLE: Oh, sure.
THE COURT: Now, was there any other proposal?
MR. BECK: No, sir, your Honor.
THE COURT: Only that there has been no deterioration?
MR. BECK: That's correct; and there's been no change of any consequence in the status of the Trustee's or the Debtor's accounts. In other words, the Reports of Operation have been filed; they show no change since the evidence that was put on at the last hearing.

[Tr. 8]

THE COURT: Would you have anything to the contrary that you would want to put before the Court, Mr. Boyle?
MR. BOYLE: At the present time, and to my knowledge, your Honor, nothing that I can present.
THE COURT: In other words, I could ask you whether you wish to stipulate that, but I don't ask you to concede any position that you might have, unless you know of your own knowledge—
MR. BOYLE: If I understand your Honor, you're asking me if I could agree to incorporate the testimony and what went on at the last hearing in this hearing today.
THE COURT: Yes, and also that there's been no change in the status of the Trustee's operations from the standpoint of a deterioration of the Trustee's position with regard to these accounts.
MR. BOYLE: If the Trustee has expressed the statement that there has been no deterioration, I am in no position to say to the contrary.

[Tr. 9]

THE COURT: All right.
Further, in regard to Mr. Beck's report, that of the total of the claims under Class 7, 8, and 9, excluding the subordinated claims, that acceptances in the amount of

$702,509.42, which are in excess of two-thirds of the amount of those claims, would you have anything to show to the Court to the contrary?

MR. BOYLE: I have nothing to show to the Court to the contrary. I'm sure Mr. Beck's figures can be supported.

THE COURT: Well, is there anything further to be offered or stated?

MR. BECK: No, your Honor.

THE COURT: By anyone?

MR. BECK: I would make this comment only, and that is if the Court should choose not to confirm the Plan, then I would recommend not that an adjudication be entered but that 60 days at least be given to determine what should occur, and whether an amended Plan or an adjudication should be entered; but on the assumption that the Court would confirm, I have nothing else to add.

THE COURT: Not having given that any consideration in depth as to what would happen if the Court did not confirm the Plan, aside from the various potentials that could be encountered if that were to occur—I say aside from those considerations—the Court has concluded that in view of the acceptances of the Plan in excess of the two-thirds amount of Classes 7, 8, and 9, that the Court would confirm the Plan, meaning that from this point on the next stage would be either an appeal or no appeal by the Government.

[Tr. 10]

MR. BECK: We will prepare the entry, your Honor, so that it may be in proper form.

THE COURT: Very well.

Is there anything further to be said?

MR. BECK: Would the appearances—

THE COURT: I don't want—Mr. Boyle, I don't want the impression to be gained that this is to be the rule as far as this particular Court is concerned. There may be many, many cases in the future where I would not pursue this course. This case has been pending a long time, and many, many of the smaller creditors have waited a very, very long time, and I have been trying to weigh

the equities, and this is an equitable proceedings even though it's governed by statute. I have been trying to weigh the equities between following the course that the Government would have the Court follow and following the course that the Court has chosen to follow, and I still believe that the factors weigh so heavily in favor of the Court confirming the Plan to get this thing closed, that the Court would not be doing what it thinks it should be if I were to go the other route.

[Tr. 11]

What I am trying to say is that if we would have had an ordinary reorganization proceedings here that had been pending, say, two or three or even four years, I might have a different attitude. I believe this case goes back to 1954, in two sections; isn't that correct?

MR. BECK: That's correct, sir.

THE COURT: So I think it's time to get the litigation pretty well finished up.

Now, the appeal may delay that; I may be wrong. If I am wrong, we'll go the other—

MR. BOYLE: Your Honor, if I may say one thing: I am sympathetic to the creditors, but I do, with due respect to the Court, think the Court is setting a precedent which can be used in any other Court in the United States, in any type of reorganization.

THE COURT: Well, I think it will turn on whether or not the Government's position is impaired by this order. And if it is appealed, perhaps no-one will have a keener interest in the outcome of the appeal than I.

[Tr. 12]

MR. BOYLE: Nor me, either, and Mr. Beck.

THE COURT: But I wanted to make it known right now that I'm not indicating by this ruling that this will be the rule as far as the Court is concerned.

MR. BOYLE: Oh, I appreciate the views of the Court. All I'm trying to do is to tell the Court what I think the law is and what the Court should do.

Now, if the Court wishes to follow my suggestion, fine; if he doesn't, why, there is no harm done whatsoever.

THE COURT: You've done your duty, I'll say that. And I've appreciated the attitude of the Government throughout the long proceedings that's been pending here before the Court.

I would say the Government has been cooperative in that regard.

MR. BOYLE: Your Honor, the Government as well as creditors has a lot of obligations to meet, and I'm sure that they would like to have this money as soon as any of these creditors, which I realize are possibly wage-earners, and other people, but I have my duty to do what I've done, and I've done it.

[Tr. 13]

THE COURT: Well, the Court will enter an order confirming the Plan.

* * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

[Caption Omitted]

ORDER CONFIRMING PLAN

At Indianapolis, in said District, on the 19th day of December, 1967.

This cause having come on to be heard on the 8th day of December, 1967, pursuant to the orders of this court of November 22, 1967, and September 21, 1967, for the consideration of the confirmation of the amended plan of reorganizaiton of Hancock-Trucking, Incorporated, the above-named debtor, approved by this court on September 21, 1967, under Section 174 of the Bankruptcy Act, and of such objections as might be made to the confirmation

thereof, and due deliberation having been had thereon, the

COURT DOES FIND:

1. That notice of the said hearing has been duly given as required by Section 179 of the said Act, and the said order of this court of September 21, 1967.

2. That for the purposes of the said plan and its acceptance, this court on July 3, 1967, entered an order fixing the division of creditors and stockholders of the said debtor into eleven (11) classes, according to the nature of their respective claims and stock; namely

(1) Holders of claims for wages earned within the three months prior to the filing of the petition commencing these proceedings i.e. March 5, 1962, not in excess of six hundred dollars ($600.00) per person.

(2) The United States with respect to all claims against the debtors inclusive of but not limited to taxes.

(3) The State of Indiana, Gross Income Tax Division, for taxes arising under the Gross Income Tax Law.

(4) The State of Indiana, County of Vanderbaugh, for personal property taxes.

(5) The State of Ohio, Department of Taxation, for Highway Use Taxes.

(6) The State of Indiana, State of Illinois, State of Ohio, State of Pennsylvania and any other state or political subdivision thereof with respect to claims for all taxes inclusive of real estate taxes, other than those taxes set forth in paragraphs 3, 4, and 5 herein.

(7) Holders of claims for damages arising out of personal injuries.

(8) Holders of claims arising out of cargo loss and damage, freight and overcharge, exclusive of claims previously allowed in the plan of reorganization confirmed on January 31, 1957.

(9) Holders of general claims, including goods sold and delivered, services rendered, independent contractor freight and steel haulers, interline accounts, trailer interchange, wage claims other than those included in class (1) herein, inclusive of claims not fully discharged under the reorganization plan confirmed January 31, 1957, and not otherwise classified.

(10) Holders of shares of preferred stock now outstanding.

(11) Holders of shares of common stock now outstanding.

3. That the plan provides that all costs and expenses of administration and other allowances which may be made by the Judge in this proceeding shall be paid in cash by Sheldon A. Key, Trustee of said debtor, out of the assets in his hands.

4. That the plan provides that all claims included in classes (1) and (6) are to be paid in cash in full.

5. That class (2) consists of one creditor, the United States of America, whose claim has been filed and allowed in the sum of Three Hundred Seventy-Seven Thousand Six Hundred Forty-Eight Dollars and Seventy-Nine Cents ($377,648.79); the said plan of reorganization has been rejected by said claimant by the filing of a written notice of the General Counsel for the Department of Treasury of the United States.

6. That class (3) consists of one creditor, the State of Indiana, Gross Income Tax Division, which has filed two claims for taxes in the aggregate amount of Thirty-One Thousand Two Hundred Eighteen Dollars and Ninety-One Cents ($31,218.91); and that the plan of reorganization has not been accepted by said creditor.

7. That class (4) consists solely of one creditor, the Treasurer of Vanderburgh County, State of Indiana, for taxes in the sum of Seventy-Six Thousand Six Hundred Fifty Dollars and Fifty-Five Cents ($76,650.55); and that the plan of reorganization has not been accepted by said claimant.

8. That class (5) consists solely of the State of Ohio, Department of Taxation for Highway Use Taxes, with a claim against the debtor for taxes in the sum of One Hundred Eighty-Five Thousand Dollars ($185,000.00), allowed herein; and that the plan has not been accepted by said claimant.

9. That pursuant to the order approving the amended plan of reorganization, creditors in classes (7), (8) and (9) have been determined to be holders of general unsecured claims and consolidated into one class for the purpose of determining whether said class of creditors has accepted the plan; that on January 14, 1966, the court entered an order allowing the claims of National Leasing Company, Inc. in the amount of Seven Hundred Seventy-Eight Thousand Three Hundred Forty-Five Dollars and Sixty-Four Cents ($778,345.64) and the claim of Wilmark Insurance Agency, Inc. in the amount of One Hundred Six Thousand Eight Hundred Ninety-Nine Dollars and Eighty-One Cents ($106,899.81), but subordinating said claims to all other creditors in the proceeding; that the aggregate of filed and allowed claims of classes (7), (8) and (9), exclusive of the subordinated claims of Wilmark Insurance Agency, Inc. and National Leasing Company, Inc., is Eight Hundred Eighty-Three Thousand Three Hundred Fifty-Six Dollars and Seventy-One Cents ($883,356.71); and that the plan has been duly accepted in writing, filed in court, by or on behalf of creditors of the said debtor owning and holding Seven Hundred Five Thousand Nine Hundred Seventy-Five Dollars and Seventy-Three Cents ($705,975.73) of claims of classes (7), (8) and (9), whose claims have been filed and allowed, and which claims are at least two-thirds (⅔) in amount of the said filed and allowed claims of classes (7), (8) and (9), exclusive of the aforesaid subordinated claims.

10. That on June 26, 1962, an order was entered herein fixing September 30, 1962, as the time within which the proofs of claim of creditors and of the interests of stockholders might be filed and providing that such claims and interests shall be deemed to be allowed unless objections are filed; and the

COURT IS SATISFIED:

11. That the provisions of Article VII, Section 199, and Article X of Chapter of the said Act have been complied with.

12. That the said plan is fair and equitable, and feasible.

13. That adequate protection for the realization by the creditors in classes (2), (3), (4), and (5) is provided by the plan by securing the payment of their claims by an assignment of note and chattel mortgage on the operating rights to be transferred to Hennis Freight Lines, Inc., and that such method safeguards the interests of such creditors and equitably and fairly provides the protection for the payment of the claims of said creditors.

14. That the proposal of the said plan and its acceptance are in good faith and have not been made or procured by means of promise forbidden by the said Act; that all payments made or to be made by the said debtor or any other person for services and for costs and expenses in, or in connection with, this proceeding or in connection with the said plan and incident to the reorganization, have been or will be fixed by the Judge.

15. There are no persons who are to be directors or officers or voting trustees upon the consummation of the plan; and it is

ORDERED, ADJUDGED AND DECREED:

16. That the holders of claims included in classes (1) and (6) are not affected by the said plan, and that it is not requisite to the confirmation of such plan that it be accepted by the holders of such claims.

17. That the debtor is insolvent.

18. That the claims of National Leasing Company, Inc. and Wilmark Insurance Agency, Inc., as creditors in class (9), being subordinated to all other creditors, are of no value and that the acceptance of the said plan by the holders of said claims is not a prerequisite to the confirmation of such plan.

19. That the interests in class (10) and (11) are of no value and that the acceptance of the said plan by the

holders of the interests in class (10) and (11) is not a prerequisite to the confirmation of such plan.

20. That the amended plan for the reorganization of the said debtor approved by this court on September 21, 1967, under Section 174 of the said Act, and as modified herein, a copy of which plan is annexed hereto and marked Exhibit "A", be, and it hereby is, confirmed.

21. That on or before the 20th day of March, 1968, Sheldon A. Key, Trustee of said debtor, be, and he hereby is, authorized and directed to consummate the sale of the operating rights of the debtor to Hennis Freight Lines, Inc. in accordance with the terms of the sale heretofore approved by this court pursuant to orders entered on October 10, 1962, and September 21, 1967.

22. That objections to the allowance of all claim in classes (1) through (9) not heretofore adjudicated, may be filed by all interested parties on or before the 20th day of March, 1968, and the court reserves the right and jurisdiction to adjudicate said claims.

23. That this court reserves the full right and jurisdiction to pass upon the allowance of compensation for services rendered in accordance with Article XIII of the Bankruptcy Act.

24. That this court reserves the full right and jurisdiction to make at any time and from time to time such orders in aid of the consummation of the said plan as the court shall deem proper.

/s/ Wm. E. Steckler
United States District Judge

[Distribution omitted]

* * * *

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

[Caption Omitted]

AMENDED PLAN OF REORGANIZATION

Amended plan of reorganization for Hancock-Trucking, Incorporated, the above named debtor.

CLASSES OF CREDITORS AND STOCKHOLDERS OF THE DEBTOR

1. Holders of claims for wages earned within the three months prior to the filing of the petition commencing these proceedings i.e. March 5, 1962, not in excess of six hundred dollars ($600.00) per person.
2. The United States with respect to all claims against the debtor inclusive of but not limited to taxes.
3. The State of Indiana, Gross Income Tax Division for taxes arising under the Gross Income Tax Law.
4. The State of Indiana, County of Vanderburgh for personal property taxes.
5. The State of Ohio, Department of Taxation for Highway Use Taxes.
6. The State of Indiana, State of Illinois, State of Ohio, State of Pennsylvania and any other state or political subdivision thereof with respect to claims for all taxes inclusive of real estate taxes, other than those taxes set forth in paragraphs 3, 4, and 5 herein.
7. Holders of claims for damages arising out of personal injuries.
8. Holders of claims arising out of cargo loss and damage, freight and overcharge, exclusive of claims previously allowed in the plan or reorganization confirmed on January 31, 1957.
9. Holders of general claims, including goods sold and delivered, services rendered, independent contractor freight and steel haulers, interline accounts, trailer interchange, wage claims other than those included in class (1) herein, inclusive of claims not fully discharged under

the reorganization plan confirmed January 31, 1957 and not otherwise classified.

10. Holders of shares of preferred stock now outstanding.

11. Holders of shares of common stock now outstanding.

ARTICLE I

PROVISIONS ALTERING OR MODIFYING RIGHTS OF CREDITORS AND STOCKHOLDERS

A. Creditors in Classes 2, 3, 4, and 5.

Holders of the following claims i.e. The United States with respect to all claims against the debtor inclusive of but not limited to taxes, the State of Indiana, Gross Income Tax Division for taxes arising under the Gross Income Tax laws, The State of Indiana, County of Vanderburgh for personal property taxes and the State of Ohio, Department of Taxation for Highway Use Taxes shall be satisfied by the payment to said creditors of ten percent (10%) of the amount of said claims, in cash, within six months from the date of confirmation of this plan of reorganization, and by the payment of the balance of said indebtedness in full, exclusive of interest, in seventy-eight equal monthly instalments, the first said instalment to be paid within six months after confirmation of the plan. Said instalment payments shall be secured by the assignment of note and chattel mortgage as hereinafter more explicitly set forth in the Means of Execution of this plan; and the rights of the creditors in the afore-mentioned classes shall be modified and altered accordingly.

B. Creditors in Classes 7, 8 and 9

Holders of claims for damages arising out of personal injuries, holders of claims arising out of cargo loss and damage, freight and over-charge, exclusive of claims previously allowed in the plan of reorganization confirmed on January 31, 1957, and holders of general claims, in-

cluding goods sold and delivered, services rendered, independent contractors, freight and steel haulers, interline accounts, trailer interchange, wage claims other than included in Class I herein, inclusive of claims not fully discharged under the reorganization plan confirmed January 31, 1957 and not otherwise classified shall be satisfied by the payment to said creditors of twenty per cent (20%) of the amount of said claims, in cash, within six months (6) of confirmation of the plan of reorganization; and the rights of the creditors in the aforementioned classes shall be modified and altered accordingly.

ARTICLE II

PROPERTY TO BE DEALT WITH BY THE PLAN

All property of the debtor will be dealt with by the plan.

ARTICLE III

PROVISIONS FOR THE PAYMENT OF ADMINISTRATION EXPENSES AND OTHER ALLOWANCES

All costs and expenses of administration and other allowances which may be made by the Judge in this proceeding shall be paid in cash by the trustee, out of the assets in his hands, prior to the payment of the claims of any creditors or stockholders of any class.

ARTICLE IV

PROVISIONS FOR THE REJECTION OF EXECUTORY CONTRACTS

All executory contracts, including unexpired leases of real property, to which the debtor is a party, are hereby rejected.

ARTICLE V

CLAIMS TO BE PAID IN CASH IN FULL

All claims included in Classes 1 and 6 are to be paid in cash in full.

ARTICLE VI

CREDITORS AND STOCKHOLDERS NOT AFFECTED BY THE PLAN AND PROVISIONS WITH RESPECT TO THEM

The following creditors and stockholders are not to be affected by the plan:

1. The holders of all claims to be paid as provided in Article V hereof.
2. The stockholders in classes 10 and 11 for the reason that, because the debtor is insolvent, their stock is valueless.

ARTICLE VII

PROVISIONS FOR CLASSES OF CREDITORS WHICH ARE AFFECTED BY AND DO NOT ACCEPT THE PLAN BY THE REQUISITE MAJORITY

In respect of any class of creditors which is affected by and does not accept the plan by the two-thirds (⅔) majority in amount required under Chapter X of the Bankruptcy Act, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan, and affected by such claims, shall be provided in the order confirming the plan by any one or more of the methods prescribed by Section 216(7) of the said Act.

ARTICLE VIII

MEANS FOR EXECUTION OF THE PLAN

On August 6, 1962, the court entered an order approving an agreement, dated February 15, 1962 between the debtor and Hennis Freight Lines, Inc., a North Carolina corporation, whereby Hancock agreed to sell and Hennis Freight Lines, Inc. agreed to buy all of the operating rights of the debtor; said agreement for sale was approved with certain modifications by the Interstate Commerce Commission; there has been filed simultaneously with the submission of this plan by the trustee a proposed

modification of said agreement of sale whereby the purchase price has been modified to provide for the payment by Hennis to the trustee of a sum not to exceed Nine Hundred Thirty Five Thousand Dollars ($935,000.00) payable three hundred thousand ($300,000.00) within ninety (90) days of the approval of the sale by the Interstate Commerce Commission and the balance in equal monthly instalments over a period of seventy eight (78) months. The modification further provides that the trustee shall submit a plan of reorganization to the court providing for a settlement in satisfaction of the claims of unsecured creditors by payment of twenty per cent (20%) of the face amount of their claims and that any excess funds after payment of all other administration expenses and priority claims in full shall be used as a reduction on the balance of the purchase price. The hearing on the approval of the modification agreement shall be brought on for hearing at the same time as the hearing on the approval of the within plan of reorganization. Pending confirmation of this plan, all other assets of the debtor will be reduced to cash.

Upon confirmation of the plan, the trustee shall make the payments provided for in Articles I, III and V.

Under the terms of the proposed sale of operating rights to Hennis, the latter is to execute its note inclusive of principal and interest at the rate of six per cent (6%) per annum on the unpaid balance in the maximum sum of Six Hundred Thirty Five Thousand Dollars ($635,000.00), reduced by the amount in excess of the sum necessary to make all of the payments as provided for in the plan, and to secure said note by a chattel mortgage on the operating rights. The aforesaid note together with the chattel mortgage securing the same shall be assigned by the debtor to a designated banking institution approved by the Judge, as trustee who shall hold the same for the benefit of the creditors in classes 2, 3, 4 and 5 herein. The instalment note shall bear an acceleration clause. The payments under the note shall be pro-rated and paid directly to the creditors in classes 2, 3, 4, and 5 by Hennis. In the event of default of any one instalment

to any one of the aforesaid four creditors notification to the designated banking institution trustee shall be sufficient for the latter to take all steps to foreclose on the operating rights and to effect collection of the note for the benefit of said four creditors in classes 2, 3, 4 and 5.

The trustee herein, shall have general supervision over the plan and the consummation thereof, subject to the approval of the court, and the trustee shall be authorized to take such steps and proceedings as he may deem advisable and as may be approved by the court in order to effect the consummation of the plan.

This Article VIII describes in general outline the means for the execution of the plan, and the precise terms and conditions thereof are to be determined by the trustee in accordance with the powers granted by the plan and under the supervision of the court to fit the facts and circumstances as they may exist from time to time during the consummation of the plan.

The trustee, with the approval of the court, may insofar as it does not materially and adversely affect the interest of the creditors and stockholders of the debtor, supply any defect or reconcile any inconsistency in such manner or to such extent as may be necessary or expedient to effect the consummation of the plan.

ARTICLE IX

PROVISIONS WITH RESPECT TO THE SELECTION OF DIRECTORS AND OFFICERS

Since the plan does not contemplate the continuation of the corporate existence of the debtor after the consummation hereof, or the formation of a new corporation, the provisions, contemplated by Section 216 (11) of the Bankruptcy Act with respect to the manner of selection of the persons who are to be directors, officers, or voting trustees, if any, upon the consummation of the plan, and their respective successors, are inapplicable.

ARTICLE X

PROVISIONS RESPECTING SECURITIES AND REPORTS TO BE INCLUDED IN THE CHARTER OF THE DEBTOR

Since the plan does not contemplate the continuation of the corporate existence of the debtor after the consummation hereof, or the formation of a new corporation, the provisions contemplated by Section 216 (12) of the Bankruptcy Act with respect to the inclusion in the charter of the debtor, or any such new corporation, of certain provisions concerning securities and reports are inapplicable.

ARTICLE XI

PROVISIONS FOR THE RETENTION, ENFORCEMENT, SETTLEMENT, OR ADJUSTMENT OF CLAIMS BELONGING TO THE DEBTOR OR TO THE ESTATE

The settlement or adjustment of any claims belonging to the debtor or to the estate being administered in this proceeding, and arising prior to the consummation of the plan, shall be the responsibility of the trustee unless the court shall order otherwise. The trustee shall be impowered to retain, inforce, collect, settle and adjust, compromise and finally release and discharge any such claims.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

[Caption Omitted]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, who has filed a claim for taxes in this proceeding, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order confirming plan entered in this action on December 19, 1967.

/s/ K. Edwin Applegate
United States Attorney

A copy of this notice has been mailed to

Sigmund J. Beck, Esq.
500 Union Federal Building
45 North Pennsylvania Street
Indianapolis, Indiana 46204

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

[Caption Omitted]

STIPULATION BETWEEN TRUSTEE IN REORGANIZATION AND THE UNITED STATES OF AMERICA REGARDING TRUSTEE'S PETITION TO OFFSET CLAIMS AGAINST THE UNITED STATES OF AMERICA

Be it stipulated by and between the trustee in Reorganization, Sheldon A. Key, and The United States of America as follows:

WHEREAS, The United States of America filed its claim, being docketed as trustee's claim No. P-1 for Internal Revenue charges in the sum of $377,648.79; and

WHEREAS, The United States of America through the United States General Accounting office filed its claim, being trustee's Docket No. P-197, in the amount of $989.55 for excess transportation charges paid to the debtor and due the United States General Accounting Office; and

WHEREAS, The United States of America through the United States General Accounting office has reduced its claim, being trustee's Docket No. P-197, to the sum of $426.64 by reason of payments received and credited to previous charges assessed against the debtor; and

WHEREAS, the trustee filed his petition on February 7, 1968 for authority to offset funds due the debtor from The United States of America for transportation of goods for the United States of America, still unpaid, in the sum of $2,765.95; and

WHEREAS, the trustee has submitted substantiating documents regarding the various funds due the bankrupt estate from The United States of America for the aforesaid transportation charges, and said documents substantiate the trustee's claim in the amount of $2,688.88;

THEREFORE, it is hereby stipulated by the undersigned counsel for the above cited parties that the trustee has a claim against The United States of America for transportation charges due it in the amount of $2,688.88, and that it is equitable that the said claim be set off against the claims filed by The United States of America in this bankruptcy proceeding, to-wit:

(a) That $426.64 of the trustee's claim in the amount of $2,688.88 be set off against the Government's amended claim No. P-197 as reduced to the amount of $426.64, satisfying said claim in full.

(b) That the remainder of the trustee's claim in the amount of $2,262.24 be set off against the claim of The United States Government for Internal Revenue charges,

being Trustee's Claim No. P-1, filed in the amount of $377,648.79, thereby reducing said claim of the United States Government to the sum of $375,386.55.

Dated this 23rd day of April, 1968.

SHELDON A. KEY, TRUSTEE IN REORGANIZATION FOR HANCOCK TRUCKING, INCORPORATED, DEBTOR

By EDWARD B. HOPPER II
One of His Counsel

THE UNITED STATES OF AMERICA
By EDWARD G. SYPNIEWSKI
One of Its Counsel

BAMBERGER & FEIBLEMAN
500 Union Federal Building
Indianapolis, Indiana

Attorneys for Trustee

EDWARD G. SYPNIEWSKI
Assistant United States District Attorney
Southern District of Indiana
Indianapolis, Indiana

[Distribution omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

September Term, 1968 September Session, 1969

No. 16857

In the Matter of

HANCOCK TRUCKING, INCORPORATED, Debtor,
UNITED STATES OF AMERICA, APPELLANT

v.

SHELDON A. KEY, TRUSTEE, APPELLEE

Appeal from the Order of the United States District Court for the Southern District of Indiana

February 27, 1969

Before FAIRCHILD and KERNER, *Circuit Judges*, and GORDON, *District Judge*.[1]

GORDON, *District Judge*. This appeal by the United States involves an unpaid federal tax claim in the stipulated amount of $375,386.55 and is taken from the order of the district court confirming an amended plan of reorganization under Chapter X of the Bankruptcy Act.

On May 3, 1954, the debtor filed a voluntary petition for reorganization in the district court in which it alleged its inability to meet its debts as they became due, and in which it requested the appointment of a trustee to operate its business and manage its property. The United States filed proofs of claim for federal withholding, excise and employment taxes.

The trustee filed an amended plan of reorganization on June 23, 1967. The plan provided that the tax claims were to be satisfied by payment of 10% of the amount of the claims in cash within six months from confirma-

[1] The writer of this opinion is sitting by designation from the United States District Court for the Eastern District of Wisconsin.

tion, and by payment of the balance, without interest, in 78 equal monthly installments. The installment payments were to be secured by an assignment of the note and chattel mortgage on the debtor's operating rights, which documents were signed by Hennis Freight Lines, Inc., the purchaser of said operating rights. The amount of the note is substantially in excess of the amount owed in connection with the federal tax claims. The unsecured creditors were to be paid 20% of their claims in cash within six months of confirmation; certain wage claimants and also certain state and local taxes were to be paid in full. This amended plan did not contemplate the continued existence of the debtor.

Previously, the district court had approved the agreement between the debtor and Hennis Freight Lines, Inc., whereby Hennis agreed to purchase all of the debtor's operating rights for an amount not to exceed $935,000, payable $300,000 within 90 days of approval of the sale by the Interstate Commerce Commission, and the balance payable in 78 equal monthly installments. The I.C.C. hearing examiner recommended that the transaction be approved, subject, however, to certain modifications in the operating rights. The I.C.C. issued its order on March 11, 1965 approving the hearing examiner's findings.

The United States filed a timely notice of rejection of the amended plan on November 20, 1967. Following a hearing, the district court issued an order confirming the plan; it found that the debtor was insolvent; the plan was fair, equitable and feasible; and that the plan afforded adequate protection to the United States and to the state and local tax creditors by the assignment of the note and chattel mortgage executed by Hennis. The United States now appeals from the order of confirmation.

The issue presented on this appeal may be stated as follows: In a corporate reorganization under Chapter X, is a plan which provides for payment of the government's tax claims by installment payments without interest "fair and equitable", or is the government, in addition to such payments, entitled to receive its funds

prior to the time payment is made to lesser ranking creditors?

Section 199 of the Bankruptcy Act (11 U.S.C. § 599) provides that

> "If the United States is a secured or unsecured creditor or stockholder of a debtor, the claims or stock thereof shall be deemed to be affected by a plan under this chapter, and the Secretary of the Treasury is hereby authorized to accept or reject a plan in respect of the claims or stock of the United States. If, in any proceeding under this chapter, the United States is a secured or unsecured creditor on claims for taxes or customs duties (whether or not the United States has any interest in, or claim against the debtor, as secured or unsecured creditor or stockholder), *no plan which does not provide for the payment thereof shall be confirmed* by the judge except upon the acceptance of a lesser amount by the Secretary of the Treasury certified to the court. . . ." [Emphasis added.]

Section 216(7) (11 U.S.C. § 616), provides in part as follows:

> "A plan of reorganization under this chapter
> ". . .
>
> "(7) shall provide for any class of creditors which is affected by and does not accept the plan by the two-thirds majority in amount required under this chapter, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims, either as provided in the plan or in the order confirming the plan . . . (d) by such method as will, under and consistent with the circumstances of the particular case, *equitably and fairly provide such protection*. . . ." [Emphasis added.]

In addition, it is stated in § 221 (11 U.S.C. § 621) that the judge shall confirm a plan "if satisfied" that the provisions of § 199 have been complied with and the plan is "fair and equitable, and feasible".

The government contends that these sections, when read together, support the position that a plan which requires the government to wait 6½ years without interest for full payment and which permits, in the interim, payment to lesser ranking creditors, is not fair and equitable. The trustee maintains that the plan involved here adequately assures payment in full of the government's tax claim in a fair and equitable manner and urges that this is all that the applicable statutes require.

Section 199 does not prescribe a particular method of payment. It merely states that the district court shall not confirm a plan "which does not provide for the payment" of the government's tax claim, unless the government accepts a lesser amount. Nor do §§ 216(7)(d) or 221 adopt a specific method of payment; rather, they are couched in terms of "equity" and "fairness". As stated in 6A Collier, *Bankruptcy*, ¶ 10.17, pp. 490-491 (14th Ed. 1965), in speaking of § 216(7)(d):

> "It has been said that these methods, properly speaking, are not 'methods' at all, but merely, empower the judge, who must approve and confirm the plan, to approve any means of treatment which under the particular circumstances 'equitably and fairly' affords adequate protection to the dissenters."

Unlike the foregoing statutes, other chapters of the Bankruptcy Act do expressly provide that the government shall be paid in cash. For example, see § 64(a)(4) [11 U.S.C. § 104(a)].

The government stresses the importance of R. S. § 3466 (31 U.S.C. § 191) and contends that it entitles the United States to immediate payment. Section 3466 provides that

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, *the debts due to the United States shall be first satisfied;* and the priority hereby established shall extend as well to cases in which a debtor, not

> having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." [Emphasis added.]

The government urges that § 3466 applies in Chapter X matters, which are not conventional bankruptcy proceedings. *United States* v. *Anderson*, 334 F.2d 111 (5th Cir. 1964); *Lowden* v. *N. W. National Bank*, 298 U.S. 160, 163 (1936). There are a number of cases in which the government's priority under § 3466 has been recognized in equity receivership proceedings, but such cases did not involve Chapter X. *Price* v. *United States*, 269 U.S. 492, 499 (1926); *United States* v. *Butterworth-Judson Corp.*, 269 U.S. 504, 513 (1926); *Spokane County* v. *United States*, 279 U.S. 80 (1929); *New York* v. *Maclay*, 288 U.S. 290 (1933).

A case in which the court did apply § 3466 to a Chapter X matter is *United States* v. *Anderson*, 334 F. 2d 111 (5th Cir. 1964). By a divided court, the court of appeals for the fifth circuit decided that the government's *non-tax* debts were to have priority. However, the court did not specify whether such non-tax claims were entitled to "payment in full" or to "first satisfaction".

It seems to us that if § 3466 is applied to a Chapter X plan, the "fair and equitable" provisions of §§ 216 (7) (d) and 221 are effectively contradicted. Section 199 bars the court from confirming a plan "which does not provide for the payment" of tax claims—unless the Secretary of the Treasury assents. Section 216(7) states that a plan under Chapter X shall "equitably and fairly provide" adequate protection for "any class of creditors which is affected by and does not accept the plan". Section 221 provides that the judge shall confirm the plan if the requirements of § 199 have been complied with and the plan is "fair and equitable, and feasible". In our opinion, these three latter sections govern tax claims of the United States in Chapter X proceedings.

The specific provisions of §§ 199, 216(7)(d) and 221 of Chapter X cannot be fairly construed to require, as a matter of law, that a plan insure the government total satisfaction of its tax claims *before* other creditors receive anything, as a condition precedent to the plans being "fair and equitable".

Within Chapter X, §§ 199, 216 and 221 are interrelated statutes and part of a studied statutory plan. Section 199 outlines the nature of the government's tax claim "priority", and the two other sections establish an equitable standard to govern the method of payment. If, as the government would have us hold, § 3466 creates an absolute right to first payment in addition to full payment, there would be little need for §§ 199, 216(7) and 221. These sections apply specifically to Chapter X proceedings and should control over the more general and conflicting direction of § 3466. *Baltimore Nat. Bank* v. *State Tax Commission of Maryland*, 297 U.S. 209, 215 (1936) and cases cited therein.

In the case at bar, the approved plan contemplates that the United States will be paid in full, and the record supports the trial court's conclusion that the plan affords reasonable protection to the government. The district court had the benefit of its own fact-finding, as well as that of the I.C.C., with respect to the value of the operating rights and the ability of the buyer to make payments under the plan. These factual determinations have not been specifically challenged here.

We hold that the trial court did not err in permitting lesser ranking creditors to receive payment simultaneously. Under the plan, the government does not surrender its right to full payment.

The government maintains that it is receiving only a "discounted value" of its claim because it does not receive interest, and it must wait 78 months for full satisfaction. The absence of interest is not a controlling factor here, for the law is well settled that the government is not entitled to post-petition interest on its tax claims in these proceedings. *United States* v. *Edens*, 189 F. 2d 876 (4th Cir. 1951), *aff'd per curiam*, 342 U.S.

865 (1952); *City of New York* v. *Saper*, 336 U.S. 328 (1949); *In re Kerber Packing Co.*, 276 F. 2d 245 (7th Cir. 1960).

The record sufficiently supports the district judge's exercise of the discretion vested in him under Chapter X. The order of the district court confirming the amended plan is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Thursday, February 27, 1969

Before

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*
Hon. MYRON L. GORDON, *District Judge*

In the Matter of

HANCOCK TRUCKING, INCORPORATED, Debtor
UNITED STATES OF AMERICA, APPELLANT

v.

SHELDON A. KEY, TRUSTEE, APPELLEE

Appeal from the United States District Court for the Southern District of Indiana Indianapolis Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court confirming the amended plan, in this cause appealed from be, and the same is hereby, affirmed, in accordance with the opinion of this Court filed this day.

SUPREME COURT OF THE UNITED STATES

No. 402, October Term, 1969

UNITED STATES, PETITIONER

v.

SHELDON A. KEY, TRUSTEE

ORDERING ALLOWING CERTIORARI. Filed October 20, 1969

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 369260 340

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

SHELDON A. KEY, TRUSTEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The order of the district court confirming the plan of reorganization (Appendix C, *infra*, pp. 10a–15a) is not officially reported. The opinion of the court of appeals (Appendix A, *infra*, pp. 1a–8a) is reported at 407 F. 2d 635.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*, p. 9a) was entered on February 27, 1969. On May 20, 1969, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and

including July 27 (a Sunday). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of the Treasury's rejection of a debtor's proposed plan of voluntary corporate reorganization under Chapter X of the Bankruptcy Act entitles the United States to have its unpaid tax claims first satisfied under Section 3466 of the Revised Statutes.

2. If the United States is not entitled to absolute priority of payment, whether it must accept payment later in time than junior creditors and without provision for interest during the period of delay.

STATUTES INVOLVED

The pertinent provisions of Revised Statutes, Section 3466 and of Sections 199, 216 and 221 of the Bankruptcy Act, as amended, are set forth in Appendix D, *infra*, pp. 16a–18a.

STATEMENT

On May 3, 1954, Hancock Trucking, Inc. (the debtor) filed a voluntary petition for corporate reorganization under Chapter X of the Bankruptcy Act, as amended, in which it alleged that it was unable to meet its debts as they became due and requested the appointment of a trustee to operate its business and manage its property. The United States filed proofs of claim for unpaid withholding of federal income, employment and excise taxes in the amount of $377,648.79. (Appendix A, *infra*, p. 1a.)

An initial reorganization plan was confirmed by the

district court in 1957 but, for reasons not relevant here, was never consummated.[1] Subsequently, with district court approval, the debtor agreed with Hennis Freight Lines, Inc. that Hennis would purchase its major asset, Interstate Commerce Commission operating rights for truck freight services. The agreement provided that Hennis would pay not more than $935,000 for the rights—$300,000 within 90 days of the Commission's approval of the sale and the balance in 78 monthly installments. The Commission approved the sale, with modifications, in March of 1965 (App. A, *infra*, p. 2a).

On June 23, 1967, the trustees filed an amended plan of reorganization, the terms of which reflected this underlying sale. The $300,000 down payment was to be exhausted by paying certain wage and local and state tax claims in full, 20 percent of the claims of the unsecured creditors, and 10 percent of the United States' tax claims and other local and state tax claims. The remainder of the amount due to the United States and to local and state tax authorities was to be paid in 78 monthly installments, secured by an assignment of the note and chattel mortgage Hennis had executed on its purchase of the debtor's operating rights. No interest was to be paid in connection with the installment payments; the plan did not contemplate the

[1] Under this plan, the United States and certain states were to be paid 25 percent of their tax claims in cash upon confirmation, and the balance in four quarterly installments, with six percent interest on the unpaid balance. The plan also provided an acceleration clause in favor of the United States in the event of default. The United States had indicated that it would accept this plan.

continued existence of the debtor (App. A, *infra*, p. 2a).

The Secretary of the Treasury filed a timely notice that he rejected the amended plan but, following a hearing, the district court nonetheless confirmed it (App. C, *infra*, p. 15a). Upon the United States' appeal from the order of confirmation, the court of appeals affirmed (App. A, *infra*, p. 8a).

REASONS FOR GRANTING THE WRIT

The court of appeals has erroneously decided an important question in the administration of the bankruptcy and federal tax laws, denying to the United States in Chapter X reorganizations of insolvent corporations the absolute priority of payment to which Section 3466 of the Revised Statutes, 31 U.S.C. 191, entitles it with respect to all debts, whether for taxes or not. The court's interpretation of Section 3466 deviates from this Court's interpretation in equity receivership proceedings, the forerunners of Chapter X reorganizations, and conflicts with the interpretation given that section by other courts of appeals in Chapter X proceedings. Moreover, even if Section 3466 were not applicable, the terms of the installment payments of the debtor's tax obligations approved below would deprive the United States of the "full payment" of taxes to which it is independently entitled by Section 199 of the Bankruptcy Act, 11 U.S.C. 599.

1. Since virtually the beginning of the Republic, Section 3466 and its predecessors have guaranteed an unqualified priority of payment for all "debts due to the United States" by an insolvent debtor. The gov-

ernment's absolute priority under Section 3466 has been uniformly held to apply to equity receivership proceedings, the forerunner of Chapter X corporate reorganizations. *Price* v. *United States,* 269 U.S. 492, 502–503; *United States* v. *Butterworth Corp.,* 269 U.S. 504, 513; *Spokane County* v. *United States,* 279 U.S. 80; *United States* v. *Emory,* 314 U.S. 423, 426–429. And with equal uniformity it has been held that the term "debts due to the United States", as used in the statute, includes federal taxes.[2] *Price* v. *United States, supra,* p. 499; *Spokane County* v. *United States, supra,* pp. 92–93; *Illinois* v. *Campbell,* 329 U.S. 362, 366–367; *Massachusetts* v. *United States,* 333 U.S. 611, 625–626.

Other courts of appeals have applied the unequivocal language of Section 3466 to give the United States first access to insolvents' assets in Chapter X reorganizations. *United States* v. *Anderson,* 334 F. 2d 111 (C.A. 5), certiorari denied, 379 U.S. 879; *In re Cherry Valley Homes, Inc.,* 255 F. 2d 706 (C.A. 3), certiorari denied *sub nom. DuBois* v. *United States,* 358 U.S. 864. To be sure, these cases involved non-tax debts owed to the government. But there is nothing in the simple language of Section 3466 that would provide any basis for distinguishing between tax debts and other kinds of debt. The court below argued that Section 3466 cannot be applied to tax obligations under Chapter X in view of the provisions of Section

[2] With respect to liquidating bankruptcies, the Act prescribes in Section 64, 11 U.S.C. 104, a complete system of priorities that supersedes Section 3466. See *United States* v. *Marxen,* 307 U.S. 200. But, as we shall show, there is no comparable superseding provision in Chapter X.

199 of the Bankruptcy Act, which authorizes the Secretary of the Treasury to accept or reject a Chapter X plan of reorganization in respect to the claims of the United States, and provides that a reorganization court may not confirm a plan which does not provide for the payment of the tax and customs claims of the United States unless the Secretary agrees to accept a lesser amount. The court reasoned that if Section 3466 were applicable there would be "little need" for Section 199 and that Section 199 must be read as displacing "the more general and conflicting direction of § 3466" (App. A, p. 7a). But there is no inconsistency or anomaly in applying both sections in a Chapter X reorganization. Section 199 applies to both solvent and insolvent corporations, and provides simply that the United States cannot be compelled to accept less than full payment of its taxes unless the Secretary of the Treasury consents. If, as here, the Secretary insists upon payment, the question of priority for that payment then arises. Section 199 does not purport to answer the priority question; in the case of an insolvent corporation like the debtor here, the general provision of Section 3466 does answer it, stating that the United States is entitled to payment *first* if it insists upon it. Thus, far from being inconsistent, the two statutes dovetail perfectly in the situation presented by this case.

There is thus no basis for distinguishing away the conflict between the decision below and the decisions of the Fifth and Third Circuits in *Anderson* and *Cherry Valley Homes, supra.* Indeed, examination of the *Anderson* opinion reveals that the Fifth Circuit

reasoned from the assumption that the government would have Chapter X priority in tax debt cases to its conclusion on the only disputed point, whether it also had priority as to non-tax debts. The government's claims in the Chapter X proceedings in *Anderson* included tax as well as non-tax debts; the district court accorded the tax debts priority and denied it only as to the non-tax debts. 334 F. 2d at 113, n. 2. Then it was argued in the court of appeals that this differentiation was proper, because Section 199 specifically provided for tax debt priority in Chapter X proceedings, but there was no similar statement regarding other government debts. The Fifth Circuit refused to draw that inference in light of the long history of undifferentiated government priority under Section 3466 of the Revised Statutes and the distinct functions of Section 199 in cases not involving insolvency. *Id.* at 116–117.

The court of appeals considered that giving the United States an absolute priority under Section 3466 would conflict with Sections 216(7)(d) and 221(2) of the Bankruptcy Act, which require that a plan of reorganization under Chapter X must, in substance, be fair, equitable, and feasible. In its construction of the fair and equitable rule, however, the court in effect eliminated the well established distinctions between senior and junior creditors, holding the government entitled to nothing more than reasonable protection. This construction of the rule is contrary to the decisions of this Court first enunciated in equity receiverships (*Northern Pacific Ry.* v. *Boyd,* 228 U.S. 482) and subsequently under

Section 77B of the Bankruptcy Act, 11 U.S.C. 205 (*Case* v. *Los Angeles Lumber Co.*, 308 U.S. 106, rehearing denied, 308 U.S. 637; *Consolidated Rock Co.* v. *DuBois*, 312 U.S. 510) and under Chapter X (*Marine Properties, Inc.* v. *Trust Co.*, 317 U.S. 78; *Protective Committee, etc.* v. *Anderson*, 390 U.S. 414, 441). As these cases held, the fair and equitable rule is applicable initially to the senior claims, and each class of claims must be satisfied in full for the rights surrendered, in descending order, before the next junior class may properly be paid in the distribution. If junior creditors receive something of value at the expense of the senior creditors, the requirements of the fair and equitable rule are not met and thus the plan "comes within judicial denunciation." *Consolidated Rock Co.* v. *DuBois, supra,* p. 529. That in effect was the result of the plan approved below. Far from being required by the fair and equitable rule, the court of appeals' decision was actually inconsistent with that rule.

2. The plan of reorganization confirmed by the district court and approved by the court of appeals provides that the government's tax claims are to be satisfied by payment of 10% of the amount of the claims in cash within six months from confirmation and by the payment of the balance, without interest, in 78 equal monthly installments. The government is thus required to wait for more than 6½ years for payment and until after payment of lower ranking creditors, in contrast to general unsecured creditors who are paid the

entire amount of their recovery within six months of confirmation. In view of the significantly discounted present value of the installment payments to be made to the government, it can scarcely be said that the government is being paid in full, as is required by Section 199 of the Bankruptcy Act even if Section 3466 does not apply. Thus, at the very least, interest would be required to compensate the United States for the delay imposed upon its receipt of the amount dut it.[3] Moreover, the delay of 6½ years in payment of the Government's tax claims imposes upon it the risks of non-consummation of the plan; the government will not in fact receive its payments unless the purchaser remains solvent during the 78 months. In light of these factors, it is plain that even apart from the obsolute priority conferred by Section 3466 the plan approved below does not provide for the "payment" of the tax obligations guaranteed by Section 199. Finally, independent even of Section 199, the requirement that the United States accept discounted value so that junior creditors may be paid is something of value the junior creditors receive at the senior creditors' expense and thus "comes within judicial denunciation," *Consolidated Rock Co.* v. *DuBois, supra,* p. 529, and the rule of Section 216(7)(d) and 221(2).

[3] The court of appeals' observation (App. A, p. 7a) that the United States is not entitled to post-petition interest is irrelevant here. The government's contention was and is not that it should receive interest on the amount of the tax obligation, but rather that interest is required to give it eventual payment of the full *principal* amount of the obligation by compensating for the discount inherent in the installment plan.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
CROMBIE J. D. GARRETT,
KARL SCHMEIDLER,
Attorneys.

JULY 1969.

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

September Term, 1968 September Session, 1969

No. 16857

In the Matter of

HANCOCK TRUCKING, INCORPORATED, Debtor,
UNITED STATES OF AMERICA, APPELLANT

v.

SHELDON A. KEY, TRUSTEE, APPELLEE

Appeal from the Order of the United States District Court for the Southern District of Indiana

February 27, 1969

Before FAIRCHILD and KERNER, *Circuit Judges,* and GORDON, *District Judge.*[1]

GORDON, *District Judge.* This appeal by the United States involves an unpaid federal tax claim in the stipulated amount of $375,386.55 and is taken from the order of the district court confirming an amended plan of reorganization under Chapter X of the Bankruptcy Act.

On May 3, 1954, the debtor filed a voluntary petition for reorganization in the district court in which it alleged its inability to meet its debts as they became

[1] The writer of this opinion is sitting by designation from the United States District Court for the Eastern District of Wisconsin.

due, and in which it requested the appointment of a trustee to operate its business and manage its property. The United States filed proofs of claim for federal withholding, excise and employment taxes.

The trustee filed an amended plan of reorganization on June 23, 1967. The plan provided that the tax claims were to be satisfied by payment of 10% of the amount of the claims in cash within six months from confirmation, and by payment of the balance, without interest, in 78 equal monthly installments. The installment payments were to be secured by an assignment of the note and chattel mortgage on the debtor's operating rights, which documents were signed by Hennis Freight Lines, Inc., the purchaser of said operating rights. The amount of the note is substantially in excess of the amount owed in connection with the federal tax claims. The unsecured creditors were to be paid 20% of their claims in cash within six months of confirmation; certain wage claimants and also certain state and local taxes were to be paid in full. This amended plan did not contemplate the continued existence of the debtor.

Previously, the district court had approved the agreement between the debtor and Hennis Freight Lines, Inc., whereby Hennis agreed to purchase all of the debtor's operating rights for an amount not to exceed $935,000, payable $300,000 within 90 days of approval of the sale by the Interstate Commerce Commission, and the balance payable in 78 equal monthly installments. The I.C.C. hearing examiner recommended that the transaction be approved, subject, however, to certain modifications in the operating rights. The I.C.C. issued its order on March 11, 1965 approving the hearing examiner's findings.

The United States filed a timely notice of rejection of the amended plan on November 20, 1967. Following

a hearing, the district court issued an order confirming the plan; it found that the debtor was insolvent; the plan was fair, equitable and feasible; and that the plan afforded adequate protection to the United States and to the state and local tax creditors by the assignment of the note and chattel mortgage executed by Hennis. The United States now appeals from the order of confirmation.

The issue presented on this appeal may be stated as follows: In a corporate reorganization under Chapter X, is a plan which provides for payment of the government's tax claims by installment payments without interest "fair and equitable", or is the government, in addition to such payments, entitled to receive its funds prior to the time payment is made to lesser ranking creditors?

Section 199 of the Bankruptcy Act (11 U.S.C. § 599) provides that

> "If the United States is a secured or unsecured creditor or stockholder of a debtor, the claims or stock thereof shall be deemed to be affected by a plan under this chapter, and the Secretary of the Treasury is hereby authorized to accept or reject a plan in respect of the claims or stock of the United States. If, in any proceeding under this chapter, the United States is a secured or unsecured creditor on claims for taxes or customs duties (whether or not the United States has any interest in, or claim against the debtor, as secured or unsecured creditor or stockholder), *no plan which does not provide for the payment thereof shall be confirmed* by the judge except upon the acceptance of a lesser amount by the Secretary of the Treasury certified to the court. . . ." [Emphasis added.]

Section 216(7) (11 U.S.C. § 616), provides in part as follows:

> "A plan of reorganization under this chapter
> "...
> "(7) shall provide for any class of creditors which is affected by and does not accept the plan by the two-thirds majority in amount required under this chapter, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims, either as provided in the plan or in the order confirming the plan . . . (d) by such method as will, under and consistent with the circumstances of the particular case, *equitably and fairly provide such protection*. . . ." [Emphasis added.]

In addition, it is stated in § 221 (11 U.S.C. § 621) that the judge shall confirm a plan "if satisfied" that the provisions of § 199 have been complied with and the plan is "fair and equitable, and feasible".

The government contends that these sections, when read together, support the position that a plan which requires the government to wait 6½ years without interest for full payment and which permits, in the interim, payment to lesser ranking creditors, is not fair and equitable. The trustee maintains that the plan involved here adequately assures payment in full of the government's tax claim in a fair and equitable manner and urges that this is all that the applicable statutes require.

Section 199 does not prescribe a particular method of payment. It merely states that the district court shall not confirm a plan "which does not provide for the payment" of the government's tax claim, unless the government accepts a lesser amount. Nor do §§ 216(7)(d) or 221 adopt a specific method of payment; rather, they are couched in terms of "equity" and "fairness". As stated in 6A Collier, *Bankruptcy*,

¶10.17, pp. 490–491 (14th Ed. 1965), in speaking of §216(7)(d):

> "It has been said that these methods, properly speaking, are not 'methods' at all, but merely empower the judge, who must approve and confirm the plan, to approve any means of treatment which under the particular circumstances 'equitably and fairly' affords adequate protection to the dissenters."

Unlike the foregoing statutes, other chapters of the Bankruptcy Act do expressly provide that the government shall be paid in cash. For example, see §64(a)(4) [11 U.S.C. §104(a)].

The government stresses the importance of R. S. §3466 (31 U.S.C. §191) and contends that it entitles the United States to immediate payment. Section 3466 provides that

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, *the debts due to the United States shall be first satisfied;* and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." [Emphasis added.]

The government urges that §3466 applies in Chapter X matters, which are not conventional bankruptcy proceedings. *United States* v. *Anderson,* 334 F. 2d 111 (5th Cir. 1964); *Lowden* v. *N. W. National Bank,* 298 U.S. 160, 163 (1936). There are a number of cases in which the government's priority under §3466 has been recognized in equity receivership proceedings, but

such cases did not involve Chapter X. *Price* v. *United States,* 269 U.S. 492, 499 (1926); *United States* v. *Butterworth-Judson Corp.,* 269 U.S. 504, 513 (1926); *Spokane County* v. *United States,* 279 U.S. 80 (1929); *New York* v. *Maclay,* 288 U.S. 290 (1933).

A case in which the court did apply § 3466 to a Chapter X matter is *United States* v. *Anderson,* 334 F. 2d 111 (5th Cir. 1964). By a divided court, the court of appeals for the fifth circuit decided that the government's *non-tax* debts were to have priority. However, the court did not specify whether such non-tax claims were entitled to "payment in full" or to "first satisfaction".

It seems to us that if § 3466 is applied to a Chapter X plan, the "fair and equitable" provisions of §§ 216 (7)(d) and 221 are effectively contradicted. Section 199 bars the court from confirming a plan "which does not provide for the payment" of tax claims—unless the Secretary of the Treasury assents. Section 216(7) states that a plan under Chapter X shall "equitably and fairly provide" adequate protection for "any class of creditors which is affected by and does not accept the plan". Section 221 provides that the judge shall confirm the plan if the requirements of § 199 have been complied with and the plan is "fair and equitable, and feasible". In our opinion, these three latter sections govern tax claims of the United States in Chapter X proceedings.

The specific provisions of §§ 199, 216(7)(d) and 221 of Chapter X cannot be fairly construed to require, as a matter of law, that a plan insure the government total satisfaction of its tax claims *before* other creditors receive anything, as a condition precedent to the plans being "fair and equitable".

Within Chapter X, §§ 199, 216 and 221 are interrelated statutes and part of a studied statutory plan.

Section 199 outlines the nature of the government's tax claim "priority", and the two other sections establish an equitable standard to govern the method of payment. If, as the government would have us hold, § 3466 creates an absolute right to first payment in addition to full payment, there would be little need for §§ 199, 216(7) and 221. These sections apply specifically to Chapter X proceedings and should control over the more general and conflicting direction of § 3466. *Baltimore Nat. Bank* v. *State Tax Commission of Maryland,* 297 U.S. 209, 215 (1936) and cases cited therein.

In the case at bar, the approved plan contemplates that the United States will be paid in full, and the record supports the trial court's conclusion that the plan affords reasonable protection to the government. The district court had the benefit of its own fact-finding, as well as that of the I.C.C., with respect to the value of the operating rights and the ability of the buyer to make payments under the plan. These factual determinations have not been specifically challenged here.

We hold that the trial court did not err in permitting lesser ranking creditors to receive payment simultaneously. Under the plan, the government does not surrender its right to full payment.

The government maintains that it is receiving only a "discounted value" of its claim because it does not receive interest, and it must wait 78 months for full satisfaction. The absence of interest is not a controlling factor here, for the law is well settled that the government is not entitled to post-petition interest on its tax claims in these proceedings. *United States* v. *Edens,* 189 F. 2d 876 (4th Cir. 1951), aff'd *per curiam,* 342 U.S. 865 (1952); *City of New York* v. *Saper,* 336 U.S. 328 (1949); *In re Kerber Packing Co.,* 276 F. 2d 245 (7th Cir. 1960).

The record sufficiently supports the district judge's exercise of the discretion vested in him under Chapter X. The order of the district court confirming the amended plan is affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

United States Court of Appeals for the Seventh Circuit
Chicago, Illinois 60604

Thursday, February 27, 1969

Before

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*
Hon. MYRON L. GORDON, *District Judge*

In the Matter of

HANCOCK TRUCKING, INCORPORATED, Debtor

UNITED STATES OF AMERICA, APPELLANT

v.

SHELDON A. KEY, TRUSTEE, APPELLEE

Appeal from the United States District Court for the Southern District of Indiana Indianapolis Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court confirming the amended plan, in this cause appealed from be, and the same is hereby, affirmed, in accordance with the opinion of this Court filed this day.

APPENDIX C

[Caption omitted]

Order Confirming Plan

At Indianapolis, in said District, on the 19th day of December, 1967.

This cause having come on to be heard on the 8th day of December, 1967, pursuant to the orders of this court of November 22, 1967, and September 21, 1967, for the consideration of the confirmation of the amended plan of reorganization of Hancock-Trucking, Incorporated, the above-named debtor, approved by this court on September 21, 1967, under Section 174 of the Bankruptcy Act, and of such objections as might be made to the confirmation thereof, and due deliberation having been had thereon, the

Court does find:

1. That notice of the said hearing has been duly given as required by Section 179 of the said Act, and the said order of this court of September 21, 1967.

2. That for the purposes of the said plan and its acceptance, this court on July 3, 1967, entered an order fixing the division of creditors and stockholders of the said debtor into eleven (11) classes, according to the nature of their respective claims and stock; namely

(1) Holders of claims for wages earned within the three months prior to the filing of the petition commencing these proceedings i.e. March 5, 1962, not in excess of six hundred dollars ($600.00) per person.

(2) The United States with respect to all

claims against the debtor inclusive of but not limited to taxes.

(3) The State of Indiana, Gross Income Tax Division, for taxes arising under the Gross Income Tax Law.

(4) The State of Indiana, County of Vanderburgh, for personal property taxes.

(5) The State of Ohio, Department of Taxation, for Highway Use Taxes.

(6) The State of Indiana, State of Illinois, State of Ohio, State of Pennsylvania and any other state or political subdivision thereof with respect to claims for all taxes inclusive of real estate taxes, other than those taxes set forth in paragraphs 3, 4, and 5 herein.

(7) Holders of claims for damages arising out of personal injuries.

(8) Holders of claims arising out of cargo loss and damage, freight and overcharge, exclusive of claims previously allowed in the plan of reorganization confirmed on January 31, 1957.

(9) Holders of general claims, including goods sold and delivered, services rendered, independent contractor freight and steel haulers, interline accounts, trailer interchange, wage claims other than those included in class (1) herein, inclusive of claims not fully discharged under the reorganization plan confirmed January 31, 1957, and not otherwise classified.

(10) Holders of shares of preferred stock now outstanding.

(11) Holders of shares of common stock now outstanding.

3. That the plan provides that all costs and expenses of administration and other allowances which may be made by the Judge in this proceeding shall

be paid in cash by Sheldon A. Key, Trustee of said debtor, out of the assets in his hands.

4. That the plan provides that all claims included in classes (1) and (6) are to be paid in cash in full.

5. That class (2) consists of one creditor, the United States of America, whose claim has been filed and allowed in the sum of Three Hundred Seventy-Seven Thousand Six Hundred Forty-Eight Dollars and Seventy-Nine Cents ($377,648.79); the said plan of reorganization has been rejected by said claimant by the filing of a written notice of the General Counsel for the Department of Treasury of the United States.

6. That class (3) consists of one creditor, the State of Indiana, Gross Income Tax Division, which has filed two claims for taxes in the aggregate amount of Thirty-One Thousand Two Hundred Eighteen Dollars and Ninety-One Cents ($31,218.91); and that the plan of reorganization has not been accepted by said creditor.

7. That class (4) consists solely of one creditor, the Treasurer of Vanderburgh County, State of Indiana, for taxes in the sum of Seventy-Six Thousand Six Hundred Fifty Dollars and Fifty-Five Cents ($76,650.55); and that the plan of reorganization has not been accepted by said claimant.

8. That class (5) consists solely of the State of Ohio, Department of Taxation for Highway Use Taxes, with a claim against the debtor for taxes in the sum of One Hundred Eighty-Five Thousand Dollars ($185,000.00), allowed herein; and that the plan has not been accepted by said claimant.

9. That pursuant to the order approving the amended plan or reorganization, creditors in classes (7), (8) and (9) have been determined to be holders of general unsecured claims and consolidated into one class for the purpose of determining whether said

class of creditors has accepted the plan; that on January 14, 1966, the court entered an order allowing the claims of National Leasing Company, Inc. in the amount of Seven Hundred Seventy-Eight Thousand Three Hundred Forty-Five Dollars and Sixty-Four Cents ($778,345.64) and the claim of Wilmark Insurance Agency, Inc. in the amount of One Hundred Six Thousand Eight Hundred Ninety-Nine Dollars and Eighty-One Cents ($106,899.81), but subordinating said claims to all other creditors in the proceeding; that the aggregate of filed and allowed claims of classes (7), (8) and (9), exclusive of the subordinated claims of Wilmark Insurance Agency, Inc. and National Leasing Company, Inc., is Eight Hundred Eighty-Three Thousand Three Hundred Fifty-Six Dollars and Seventy-One Cents ($883,356.71); and that the plan has been duly accepted in writing, filed in court, by or on behalf of creditors of the said debtor owing and holding Seven Hundred Five Thousand Nine Hundred Seventy-Five Dollars and Seventy-Three Cents ($705,975.73) of claims of classes (7), (8) and (9), whose claims have been filed and allowed, and which claims are at least two-thirds (⅔) in amount of the said filed and allowed claims of classes (7), (8) and (9), exclusive of aforesaid subordinated claims.

10. That on June 26, 1962, an order was entered herein fixing September 30, 1962, as the time within which the proofs of claim of creditors and of the interests of stockholders might be filed and providing that such claims and interests shall be deemed to be allowed unless objections are filed; and the

COURT IS SATISFIED:

11. That the provisions of Article VII, Section 199, and Article X of Chapter X of the said Act have been complied with.

12. That the said plan is fair and equitable, and feasible.

13. That adequate protection for the realization by the creditors in classes (2), (3), (4), and (5) is provided by the plan by securing the payment of their claims by an assignment of note and chattel mortgage on the operating rights to be transferred to Hennis Freight Lines, Inc., and that such method safeguards the interests of such creditors and equitably and fairly provides the protection for the payment of the claims of said creditors.

14. That the proposal of the said plan and its acceptance are in good faith and have not been made or procured by means of promise forbidden by the said Act; that all payments made or to be made by the said debtor or any other person for services and for costs and expenses in, or in connection with, this proceeding or in connection with the said plan and incident to the reorganization, have been or will be fixed by the Judge.

15. There are no persons who are to be directors or officers or voting trustees upon the consummation of the plan; and it is

ORDERED, ADJUDGED AND DECREED:

16. That the holders of claims included in classes (1) and (6) are not affected by the said plan, and that it is not requisite to the confirmation of such plan that it be accepted by the holders of such claims.

17. That the debtor is insolvent.

18. That the claims of National Leasing Company, Inc. and Wilmark Insurance Agency, Inc., as creditors in class (9), being subordinated to all other creditors, are of no value and that the acceptance of the said plan by the holders of said claims is not a prerequisite to the confirmation of such plan.

19. That the interests in class (10) and (11) are of no value and that the acceptance of the said plan by the holders of the interests in class (10) and (11) is not a prerequisite to the confirmation of such plan.

20. That the amended plan for the reorganization of the said debtor approved by this court on September 21, 1967, under Section 174 of the said Act, and as modified herein, a copy of which plan is annexed hereto and marked Exhibit "A", be, and it hereby is, confirmed.

21. That on or before the 20th day of March, 1968, Sheldon A. Key, Trustee of said debtor, be, and he hereby is, authorized and directed to consummate the sale of the operating rights of the debtor to Hennis Freight Lines, Inc. in accordance with the terms of the sale heretofore approved by this court pursuant to orders entered on October 10, 1962, and September 21, 1967.

22. That objections to the allowance of all claims in classes (1) through (9) not heretofore adjudicated, may be filed by all interested parties on or before the 20th day of March, 1968, and the court reserves the right and jurisdiction to adjudicate said claims.

23. That this court reserves the full right and jurisdiction to pass upon the allowance of compensation for services rendered in accordance with Article XIII of the Bankruptcy Act.

24. That this court reserves the full right and jurisdiction to make at any time and from time to time such orders in aid of the consummation of the said plan as the court shall deem proper.

(S) WM. E. STECKLER,
United States District Judge.

[Distribution omitted]

APPENDIX D

Revised Statutes:

> SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

(31 U.S.C. 191.)

Bankruptcy Act, c. 541, 30 Stat. 544 [as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840, 893]:

> SEC. 199. If the United States is a secured or unsecured creditor or stockholder of a debtor, the claims or stock thereof shall be deemed to be affected by a plan under this chapter, and the Secretary of the Treasury is hereby authorized to accept or reject a plan in respect of the claims or stock of the United States. If, in any proceeding under this chapter, the United States is a secured or unsecured creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against the debtor, as secured or unsecured creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance of a lesser amount by the Secretary of the Treasury certified to the court: *Provided,*

That if the Secretary of the Treasury shall fail to accept or reject a plan for more than ninety days after receipt of written notice so to do from the court to which the plan has been proposed, accompanied by a certified copy of the plan, his consent shall be conclusively presumed.

(11 U.S.C. 599.)

SEC. 216. A plan of reorganization under this chapter—

(1) shall include in respect to creditors generally or some class of them, secured or unsecured, and may include in respect to stockholders generally or some class of them, provisions altering or modifying their rights, either through the issuance of new securities of any character or otherwise;

(2) may deal with all or any part of the property of the debtor;

(3) shall provide for the payment of all costs and expenses of administration and other allowances which may be approved or made by the judge;

* * * * *

(7) shall provide for any class of creditors which is affected by and does not accept the plan by the two-thirds majority in amount required under this chapter, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims, either as provided in the plan or in the order confirming the plan, (a) by the transfer or sale, or by the retention by the debtor, of such property subject to such claims; or (b) by a sale of such property free of such claims, at not less than a fair upset price, and the transfer of such claims to the proceeds of such sale; or (c) by appraisal and payment in cash of the value of such claims; or (d) by such method as will, under and consistent with the circumstances of the particular

case, equitably and fairly provide such protection;

* * * * *

(11 U.S.C. 616.)

SEC. 221. The judge shall confirm a plan if satisfied that—

(1) the provisions of article VII, section 199, and article X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

* * * * *

(11 U.S.C. 621.)

U.S. GOVERNMENT PRINTING OFFICE: 1949

FILE COPY

FILED
AUG 28 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of The United States

October Term, 1969

NO. 402

UNITED STATES OF AMERICA,

Petitioner,

v.

SHELDON A. KEY, TRUSTEE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SIGMUND J. BECK,
500 Union Federal Building,
Indianapolis, Indiana 46204

EDWARD B. HOPPER II,
Counsel for Respondent.

BAMBERGER & FEIBLEMAN,
Of Counsel.

Central Publishing Company, Inc., Indianapolis, Ind.

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OPINIONS BELOW

Although there was no formal opinion of the District Court, the order of the District Court dated December 19, 1967, confirming the respondent's amended plan of reorganization is set forth in the petition as Appendix C p. 10a. The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 407 F. 2d 635 (1969). It affirmed the ruling of the District Court.

JURISDICTION

The Petitioner is invoking the jurisdiction of this Court under 28 U.S.C. Sec. 1254 (1). As set forth in Rule 19 of the Supreme Court of the United States, "a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

QUESTIONS PRESENTED

Did the District Court for the Southern District of Indiana, Indianapolis Division, and the Seventh Circuit Court of Appeals err in holding that Section 199 of the Bankruptcy Acts does not vest in the Secretary of the Treasury the authority to defeat a plan by written rejection where such plan provides for payment of the Government's Tax claim without interest, and also provides the Government with a security interest in contract rights of the debtor valued in excess of its claim?

STATUTES INVOLVED

The pertinent provisions of the Bankruptcy Act, as amended, are Sections 199, 216, 221 and 236. The only statute involved in addition to the Bankruptcy Act is Revised Statute, Sec. 3466. The statutory provisions are set forth at pages 16a to 18a of the petition with the exception of Sec. 236 of the Bankruptcy Act which appears in The Appendix *infra*. page A-1.

STATEMENT OF THE CASE

The Petitioner seeks this court's review of a decision of the United States Court of Appeals for the Seventh Circuit affirming an order of the United States District Court for

the Southern District of Indiana, Indianapolis Division, confirming an amended plan of reorganization submitted by Sheldon A. Key, Trustee, under Chapter X of the Bankruptcy Act. The material facts may be summarized as follows:

The debtor filed its voluntary petition in the District Court for a reorganization under Chapter X of the Bankruptcy Act, on May 3, 1954, as a general commodity carrier operating by authorization of the Interstate Commerce Commission over a network of regular routes extending through the states of Wisconsin, Missouri, Illinois, Kentucky, Indiana, Pennsylvania, Ohio and Michigan.

The trustee's plan of reorganization as modified was confirmed on January 31, 1957. The plan provided for payment in full or part of claims totalling in excess of $1,500,000, including the claim of the United States for taxes totalling $411,458.06. The claim of the United States was to be paid in installments over a four year period. Wage claims and secured creditors were paid in cash in full. Unsecured creditors received a choice of cash settlements, extended payments or stock.

On June 1, 1958, the property and assets in possession of the trustee were vested in the reorganized debtor corporation, and the cash and shares of stock provided for under the plan were paid out as designated to the creditors involved therein.

On December 6, 1961, the trustee filed his petition to declare the plan of reorganization substantially consummated and to direct a filing of his final report. At that time all claims in the proceeding had been adjudicated. The claim of the United States had been paid down pursuant to the plan, to a balance of $181,563.33, inclusive of principal and interest.

At or about the same time the reorganized debtor had entered into negotiations with Hennis Freight Lines, Inc. (hereinafter referred to as "Hennis"), a general commodity carrier doing business mainly between the southern states and New York, Philadelphia, and New Jersey industrial centers, for a sale of its certificate of convenience and necessity issued by the Interstate Commerce Commission. On February 15, 1962, an agreement of sale was entered into between the parties providing for a sale of the Hancock operating rights to Hennis for the sum of $1 Million, inclusive of principal and interest, payable $300,000 within 90 days of approval and the balance in 78 equal monthly installments. The contract also provided in the event of cancellation of a portion of the Hancock operating rights by the Interstate Commerce Commission for a reduction in the purchase price in direct ratio to the number of miles embraced in the cancelled rights. Pending the approval of sale by the Interstate Commerce Commission Hennis agreed to lease the operating rights pursuant to temporary authority for the sum of $2,000.00 per month.

On March 5, 1962, before hearing on the trustee's petition was held, three creditors whose claims had arisen subsequent to June 1, 1958, filed a petition praying (1) that the plan of reorganization be amended to provide for payment of creditors whose obligations arose subsequent to the confirmation of the plan and (2) that the trustee be empowered to retake control and possession of the debtor. The petition alleged *inter alia* the insolvency of the reorganized debtor. On March 15, 1962, after due hearing, the district court entered its order revesting the trustee with title to the property of the debtor and directing the trustee to proceed as though Chapter X proceedings had commenced.

Among the claims filed with the trustee after he reassumed possession of the property and assets of the debtor was that of the Government in the total sum of $380,419.01, representing the balance due it under the plan confirmed in 1958 totalling $181,563.33, together with new liabilities incurred by the reorganized corporation, inclusive of principal and interest, totalling $197,975.40. The claim has since been reduced and allowed pursuant to stipulation in the sum of $375,396.55.

Subsequent to the return of the assets and property to the possession of the trustee, the district court entered its order on August 10, 1962, affirming the contract of sale between Hennis and the debtor involving the sale of the debtor's interstate operating rights and authorizing the trustee to take all steps necessary to consummate the sale.

The application under Section 5 of the Interstate Commerce Act was referred to a hearing examiner who submitted his report on August 15, 1964, recommending that the sale transaction be approved providing, however, for a modification imposing certain restrictions on shipments originating from and destined to Detroit, Michigan.

The Interstate Commerce Commission issued its order approving the hearing examiner's report on March 11, 1965.

The trustee filed suit in the district court to overrule the Interstate Commerce Commission. The three-judge court entered an order on January 12, 1967, sustaining the Interstate Commerce Commission.

Thereafter, Hennis insisted on a reduction in sale price pursuant to the terms of the contract. After extensive negotiations a modification of the original purchase agreement was entered into.

The modification provided for a purchase price to be paid by Hennis of $935,000 in lieu of the original $1 Million, payable as in the original agreement—$300,000 within 90 days of final approval and the balance of $635,000 by a note secured by a chattel mortgage on the operating rights payable in 78 equal monthly installments. The trustee agreed to submit a plan providing for payment of all administration and priority claims in full, without interest, and for settlement of all unsecured claims for 20% of the amounts due. The purchase price was to be further reduced by deducting therefrom any funds in excess of the amounts needed to satisfy the plan.

The proceeds from the sale of the operating rights under the modified agreement of sale, together with approximately $75,000 representing funds in the hands of the trustee, formed the means of execution under the trustee's amended plan of reorganization as filed on June 23, 1967. The amended plan of reorganization classified the United States as a Class 2 creditor providing payment for the United States and certain other state tax claimants as follows:

> ". . . (B)y the payment to said creditors of ten per cent (10%) of the amount of said claims, in cash, within six months from the date of confirmation of this plan of reorganization, and by payment of the balance of said indebtedness in full, exclusive of interest, in seventy-eight equal monthly installments, the first said installment to be paid within six months after confirmation of the plan. Said installment payments shall be secured by the assignment of note and chattel mortgage as hereinafter more explicitly set forth in the Means of Execution of this plan; and the rights of the creditors in the aforementioned classes shall be modified and altered accordingly".

There is no provision in the plan for any class of creditor to receive interest on its claim whatsoever.

Article VIII of the amended plan of reorganization provides security for the payment of the United States and other tax claimants by providing that Hennis will execute a note in an amount not to exceed $635,000 reduced by the amount in excess of the sum necessary to make the payments provided for under the plan. The actual amount of the note has now been fixed in the sum of $600,968.16, representing the total amount of the claims of the four tax creditors less the 10% to be paid on confirmation.[1] This note will be secured by a chattel mortgage on the operating rights. The aforementioned note and mortgage will be assigned by the debtor to a banking institution approved by the court as trustee for the benefit of the United States and the three other tax claimants. Hennis will make the prorated monthly payments totalling approximately $7,700 directly to the claimants rather than to the trustee.

In addition to providing for tax claimants and unsecured creditors, holders of claims for wages will be paid in cash within six months and the claims of various states for real and personal property taxes are to be paid within six months from the date of confirmation. No provision is made in the plan for stockholders, by reason of the insolvency of the debtor.

---

[1] Class 2, United States $375,396.55
Class 3, State of Indiana, Gross Income Tax 31,218.91
Class 4, State of Indiana, Vanderburgh County 76,650.55
Class 5, State of Ohio, Highway Use Tax 184,486.39

$667,742.40
Less 10% 66,774.24

$600,968.16

On September 7, 1967, the petition for approval of the agreement modifying the 1962 contract for sale of the debtor's operating rights to Hennis and approval of the amended plan of reorganization were brought on for hearing simultaneously. The court, after hearing the trustee's witnesses, Jesse L. Phipps, Vice President of Hennis; Thomas W. Andrews, Vice President of McLean Trucking Company, Webster Division; and Sheldon A. Key, trustee, held that $935,000 was a fair price for the debtor's interstate operating rights and approved the agreement. The Government filed notice of rejecting the plan on November 20, 1967.

On December 19, 1967, the district court entered its order confirming the plan of reorganization. (Petitioner's Brief App. C, pp. 10a-15a).

ARGUMENT

The decision below is correct and not in direct conflict with any other decisions. Moreover, the issue presented is narrow and unique to the facts of this case and thus the question is not one of substantial importance to administration of bankruptcy reorganization proceedings.

To interpret the Seventh Circuit holding in this case as an impairment of the Petitioner's right to priority status in a Chapter X proceeding is a misconception. This misconception of the opinion of the Lower Court is the basis of the petition. The Petitioner goes to great lengths to argue that the Seventh Circuit erroneously decided that R. S. Sec. 3466 was inapplicable in Chapter X proceedings.

The Court's decision was based on the interpretation of Secs. 199, 216(7) and 221 of the Bankruptcy Act.

The Lower Court correctly held that Section 199 of the Act governed the nature of the Government's tax claim priority and related Sections 216(7) and 221 governed the method of payment.

For all intent and purpose in a corporate reorganization the priority granted by Sec. 199 is the same as that of R. S. Sec. 3466.

That portion of the opinion regarding the applicability of R. S. Section 3466 was not essential to the decision of the Lower Court and as such is *dictum*—correct *dictum,* but *dictum* nonetheless. This Court normally is not called upon to review *dictum* but this seems to be the crux of the Petitioner's argument.

In commenting on R. S. Section 3466, the Lower Court correctly reasoned if this section ". . . is applied to a

Chapter X plan, the 'fair and equitable' provisions of Sections 216(7)(d) and 221 are effectively contradicted." *In re Hancock Trucking Incorporated,* 407 F. 2d 635, 638 (CA-7, 1969). The Seventh Circuit's opinion continued:

> "Section 199 outlines the nature of the government's tax claim 'priority' and the two other sections establish an equitable standard to govern the method of payment."
>
> • • • • •
>
> "The specific provisions of Sections 199, 216 (7) (d) and 221 of Chapter X cannot be fairly construed to require, as a matter of law, that a plan insure the government total satisfaction of its tax claims *before* other creditors receive anything, as a condition precedent to the plans being 'fair and equitable'." *Ibid.*

Thus the Lower Court did not hold that Government was not entitled to priority status as a claimant. To the contrary, the Seventh Circuit went on to say that the plan contemplated that the Government's claim would be paid in full:

> "In the case at bar, the approved plan contemplates that the United States *will be paid in full,* and the record supports the trial court's conclusion that the plan affords reasonable protection to the government." *In re Hancock Trucking, Incorporated,* 407 F. 2d 635, 638 (CA-7, 1969). (Emphasis ours.)

The petitioner apparently infers that the absolute priority granted by either Sec. 199 of the Bankruptcy Act or R. S. Sec. 3466 implies an absolute veto power in the United States if its claims are not paid in cash immediately.

Thus, the petitioner claims that the opinion dealing with R. S. Section 3466 is in conflict with *United States v. Anderson,* 334 F. 2d 111 (CA-5, 1964) *cert. denied* 379

U. S. 879 (1964) and *In re Cherry Valley Homes, Inc.*, 225 F. 2d 706 (CA-3, 1958) *cert. denied sub nom DuBois v. United States,* 358 U. S. 864 (1958). The Petitoner, however, has overlooked the fact that neither one of these courts had before it the same question which is presented herein and upon which the Seventh Circuit rendered its opinion.

The Cherry Valley Homes Case involved a tax claim the Government had against "Tobin", a creditor of Cherry Valley Homes Inc., the debtor corporation. Cherry Valley owed Tobin a smaller amount than Tobin's tax indebtedness. The Government served Cherry Valley with appropriate process to levy on this claim six months prior to Cherry Valley's voluntary petition under Chapter X. The Fifth Circuit held that the levy would be treated as analogous to a seizure establishing priority for the Government over general creditors under Section 199 or as a lien creditor. The Court indicated in the alternative that this priority status would also exist by reason of R. S. 3466. There is no discussion in the opinion that the application of R. S. 3466 would grant the United States' claim for taxes any greater priority rights than it would otherwise have as a secured creditor.

The Lower Court itself distinguished the *Anderson Case, supra,* as follows:

> "A case in which the court did apply Section 3466 to a Chapter X matter is United States v. Anderson 334 F. 2d 111 (5th Cir. 1964). By a divided Court, the Court of Appeals for the fifth circuit decided that the government's *non-tax* debts were to have priority. However, the Court did not specify whether such non-tax claims were entitled to 'payment in full' or to 'first satisfaction'." *In re Hancock Trucking Incorporated,* 407 F. 2d 635, 638 (CA-7, 1969).

In the *Anderson Case* claims of the Maritime Administration, Small Business Administration, Department of the Navy and Post Office Department were denied priority status in the plan of reorganization. The Fifth Circuit held that such claims of the United States were accorded priority status under R. S. Section 3466. The Court went on to say that R. S. 3466 and Section 199 were not inconsistent when an insolvent debtor was involved. The Fifth Circuit did not consider Section 199 in connection with related sections 216(7)(d) and 221, nor did it consider the manner in which payment of the priority claims was to be made.

The Petitioner's claim that the holding of the Lower Court is in conflict with the "absolute priority rule" set forth in *Northern Pacific Railway v. Boyd Lumber Co.*, 228 U.S. 482 (1912) is erroneous. On the contrary the decision of the Seventh Circuit adhered to the "rule of absolute priority" in its determination of the instant case. The Court reasoned that the Trustee's plan recognized and provided for "payment" of the principal amount of the Government's tax claims, required under Section 199. The plan required the Government to surrender no right it was legally entitled to and for which, under *Case v. Los Angeles Lumber Co.*, 308 U. S. 106 (1939) *rehearing denied*, 308 U.S. 637 (1939), and *Consolidated Rock Products Co. v. Dubois*, 312 U.S. 510 (1940) complete compensation must be provided. The plan provided that as soon as funds became available through installment payments by Hennis, these funds were immediately paid to tax claimants.

There is no provision of Chapter X which specifically prohibits, or has been interpreted as prohibiting, the payment of a dividend to lesser ranking creditors out of funds other than those allocated to satisfy the Government claim,

especially when such general creditors accept a lesser dividend in exchange for earlier payment.

It is an economic fact in the instant case that if confirmation of the plan were denied, the debtor would be forced to liquidate in a superseding bankruptcy proceeding. If that occurs, it can be assumed[2] general creditors would receive a minimum of 28% after 6 1/2 years instead of 20% and the Government's tax claim of $375,000 would be paid in full in 4 1/2 years *without interest.*[3]

The foregoing observation also aptly illustrates that acceptance of the plan by general creditors is in fact an agreement to scale down their claims. Compromise of claims by the trustee is proper throughout the proceeding. *Case v. Los Angeles Lumber Co., supra.* This important

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[2] In all probability the trustee in bankruptcy would not want to renegotiate the sale due to the lengthy proceeding to have the sale approved by the I. C. C. and the fact that the terms of the sale to Hennis have already been deemed "fair" by the Court.

[3] The calculation is based on cash in the hands of the trustee of $75,000; payments made by Hennis under the contract of purchase of $300,000 within 90 days and the balance of $635,000 in 78 monthly installments; costs of administration of $90,000 maximum; priority tax claims and wage claims Sec. 64(a) of $683,148.71 and general unsecured claims of $834,000.

Total Funds available		$1,010,000
Administration Expenses	$90,000	
Priority claims	684,000	
		774,000
Balance of		$ 236,000

For pro rata distribution to 834,000 or 28%

Under the installment plan it will be 4½ years before the $774,000 required to be paid to priority claimants is accumulated. As the costs of administration are decreased, the dividend to general creditors increases proportionately. If the costs of administration are $50,000 the dividend would be 32%. The general creditors would have to wait 6½ years for full payment.

facet of the case, raised in the Lower Court is ignored by the Petitioner in its argument that general creditors are being paid at the expense of the Government.

The Lower Court also followed the opinion of this Court in *City of New York v. Saper,* 336 U. S. 328 (1948) applied to Chapter X in *United States v. Edens,* 189 F. 2d 876 (CA-4, 1951) *aff'd per curiam* 342 U.S. 912 (1951) in rejecting the Government's argument for interest on the unpaid balance, i.e. the claim amounts to a demand for post-petition interest. The demand for interest in the case at bar was correctly reviewed as an attempt to circumvent the decision in the *Saper Case, supra.*

As to the Petitioner's argument that the decision of the Lower Court is in conflict with the decisions of this Court holding R. S. 3466 applicable to equity receivership proceedings, it is submitted that such receivership proceedings involved no rule of law comparable to Section 199, nor as we have pointed out is R. S. 3466 in conflict with Sec. 199.

Most important, any weight given to the decision must be greatly tempered by the unique facts in the instant case.

In the bulk of Chapter X cases when reorganization of a corporation fails, the debtor is liquidated in a superseding straight bankruptcy proceeding pursuant to Section 236 of the Act. *John Hancock Life Insurance Co. v. Casey,* 141 F. 2d 104, (CA-1, 1944) *cert. denied* 323 U.S. 713 (1944). This Court is cognizant that R. S. Sec. 3466 would be inapplicable in such cases. *United States v. Marxen,* 307 U.S. 200 (1938). The proposal of the 1967 amended plan was possible on the basis of primarily four factual facets of the case and the proposed plan:

(1) The length of the proceedings, commencing in 1954 had enabled the debtor to present one plan, march out of court, and agree to sell its asset (its interstate operating rights) for a substantial sum prior to the Reorganization Court re-acquiring jurisdiction in 1962.

(2) An agreement for a long term installment sale of the interstate operating rights was reached and a lengthy proceeding for approval was in the offing before the Interstate Commerce Commission when the Reorganization Court re-acquired jurisdiction; the conclusion of the case under Chapter X as opposed to straight bankruptcy was therefore desirable.

(3) The mechanics of the plan under which payment of tax claims, including the United States, is to be made involves a fund created by installment payments on the sale of the interstate rights, paid over a period of 6 1/2 years; payment being secured by a security interest in such rights.

(4) The unsecured creditors having claims totaling $834,000 agreed to accept a 20% cash dividend in lieu of awaiting final liquidation.

In further reviewing the facts surrounding the instant case this Court should consider the amount in dispute. The Government complains pertinaciously of a 6 1/2 year wait for full satisfaction of its claim, arguing that failure to pay interest on its claim during this period is "judicial denunciation" even though funds for this purpose are not available to the trustee. As heretofore indicated, if this estate were liquidated in straight bankruptcy, sufficient funds would not be available to satisfy the claim of the United States for 4 1/2 years (Fn 3 p. 13). Thus, the interest to which the United States would be entitled, if at all, would amount to no more than $6,492.00. Such is the disputed amount in the case the Petitioners would have

this Court review. Nor does this small amount represent any existing or potential class of similar claims.

CONCLUSION

For the foregoing reasons and authorities cited, the petition for writ of certiorari should be denied.

Respectfully submitted.

SIGMUND J. BECK,
500 Union Federal Building,
Indianapolis, Indiana 46204

EDWARD B. HOPPER II,
Counsel for Respondent.

BAMBERGER & FEIBLEMAN,
Of Counsel.

APPENDIX

Bankruptcy Act, c. 541, 30 Stat. 544 (as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840, 893):

Sec. 236. If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consumated, the judge shall—

(1) where the petition was filed under section 127 of this Act, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this Act; or

(2) where the petition was filed under section 128 of this Act, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders.

(11 U.S.C. 636)

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13 Eliz. I, c. 4 9
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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 402

UNITED STATES OF AMERICA, PETITIONER
v.
SHELDON A. KEY, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order of the district court confirming the plan of reorganization (R. 58–63)[1] is not officially reported. The opinion of the court of appeals (R. 74–80) is reported at 407 F. 2d. 635.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1969 (R. 81). On May 20, 1969, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including July 27, 1969. The petition for a writ of certiorari was filed on July 28, 1969 (July 27, 1969, being a Sunday), and

[1] "R." references are to the separately bound record appendix.

was granted on October 20, 1969. The jurisdiction of this Court is conferred by 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Secretary of the Treasury's rejection of a debtor's proposed plan of voluntary corporate reorganization under Chapter X of the Bankruptcy Act entitles the United States to have its unpaid tax claims first satisfied under Section 3466 of the Revised Statutes.

2. If the United States is not entitled to priority of payment, whether it must accept payment later in time than junior creditors and without provision for interest during the period of delay.

STATUTES INVOLVED

The pertinent provisions of Revised Statutes, Section 3466, and of Sections 102, 107, 115, 197, 199, 216, and 221 of the Bankruptcy Act, as amended, are set forth in the Appendix, *infra,* pp. 41–44.

STATEMENT

On May 3, 1954, Hancock Trucking, Inc. (the debtor), filed a voluntary petition for corporate reorganization under Chapter X of the Bankruptcy Act, as amended, in which it alleged that it was unable to meet its debts as they became due and requested the appointment of a trustee to operate its business and manage its property (R. 74). The United States filed proofs of claim for unpaid withholding of federal income, employment and excise taxes in the amount of $377,648.79 (R. 5–8, 21–22, 74).

An initial reorganization plan was confirmed by the district court in 1957 but, for reasons not relevant here, it was never consummated.[2] Subsequently, with district court approval, the debtor agreed with Hennis Freight Lines, Inc. that Hennis would purchase its major asset, its Interstate Commerce Commission operating rights for truck freight services. The agreement provided that Hennis would pay not more than $935,000 for the rights—$300,000 within 90 days of the Commission's approval of the sale and the balance in 78 monthly installments. The Commission approved the sale, with modifications, in March, 1965 (R. 9–11, 12–20, 23–28, 40–43, 75).

On June 23, 1967, the trustee filed an amended plan of reorganization, the terms of which reflected this underlying sale. The $300,000 down payment was to be exhausted by paying 100 percent of certain wage and local and state claims, 20 percent of the claims of the unsecured creditors, and 10 percent of the United States' tax claims and other state and local tax claims. The remainder of the amount due to the United States and to state and local tax authorities was to be paid in 78 monthly installments, secured by an assignment of the note and chattel mortgage Hennis had executed on its pur-

[2] Under this plan, the United States and certain states were to be paid 25 percent of their tax claims in cash upon confirmation, and the balance in four quarterly installments, with six percent interest on the unpaid balance. The plan also provided an acceleration clause in favor of the United States in the event of default. The United States had indicated that it would accept this plan.

chase of the debtor's operating rights. No interest was to be paid in connection with the installment payments, and the plan did not contemplate the continued existence of the debtor (R. 43–45, 64–70, 74–75).

The Secretary of the Treasury filed a timely notice that he rejected the amended plan (R. 51, 75), but, following a hearing, the district court nonetheless confirmed it (R. 58–63, 75). Upon appeal by the United States from the order of confirmation (R. 71), the court of appeals affirmed (R. 74–80).

ARGUMENT

INTRODUCTION AND SUMMARY

The present case involves the meaning and interaction in a reorganization under Chapter X of the Bankruptcy Act of three sets of statutory provisions:

> (1) Section 3466 of the Revised Statutes, 31 U.S.C. 191, which provides in straightforward terms that "[w]henever any person indebted to the United States is insolvent * * * the debts due to the United States shall be first satisfied";
>
> (2) Section 199 of the Bankruptcy Act, 11 U.S.C. 599, which provides as to federal tax claims against both solvent and insolvent corporations in reorganization, that "no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance of a lesser amount by the Secretary of the Treasury * * *";
>
> (3) Sections 216 and 221 of the Act, 11 U.S.C. 616, 621, which require that a plan of reorganization must "equitably and fairly"

> protect the value of claims made by "any class of creditors which is affected by and does not accept the plan," without specific reference to the United States, and that the "judge shall confirm a plan if satisfied that—(1) the provisions of * * * section 199 * * * have been complied with; and (2) the plan is fair and equitable * * *."

The questions of meaning which arise in this case include the following: What is required by the mandate of Section 3466 that debts due the United States be "first satisfied"? What constitutes "payment" of tax claims under Section 199 and what is "a lesser amount"? What, under Sections 216 and 221, constitutes "fair and equitable" protection of the claims of a class of creditors?

The principal question of interaction among the statutory provisions involves the relationship between Section 199 and Section 3466—whether the "payment" requirement can be met only if the government's tax claims are "first satisfied," and, if not, whether in Chapter X proceedings provision for "payment" is enough. In addition, there is a question of the relationship between Section 199 and Sections 216 and 221—whether a provision for "payment" under Section 199 is, *ipso facto,* "fair and equitable" to the United States under the latter sections.

The plan which the courts below approved as "payment" of the government's claim, and therefore "fair and equitable," provides for an initial payment—on the government's total claim of $375,400—of approximately $37,500 and 78 equal monthly installments of

approximately $4,330. The Revenue Service informs us that the present value of the right to receive monthly payments in that amount for 78 months, figuring six percent interest compounded semi-annually, is approximately $280,000; thus the total package of initial payment and installments, under this hypothesis, would be worth approximately $317,000. On the other hand, if the United States is entitled to be paid first, allowing $90,000 for administrative expenses and $14,500 for the few claims which may have priority,[3] it would receive $271,000 at once,[4] and thirteen monthly installments of approximately $8,140. The value of this package is insignificantly less than the government's total claim of $375,400. We submit that the scheme of payment approved below fails to satisfy the rights of the United States under each of the three applicable statutes.

We seek to show, first, that the long established general requirement of Section 3466, that debts of an insolvent debtor to the United States must be "first satisfied", entitles the United States to absolute priority of payment of its claims in a Chapter X reorganization. Such priority covers tax debts as well as other debts, and on the facts of this case it is indisputable that the debtor is insolvent; thus, the provi-

[3] It appears from respondent's brief below that there are approximately $14,500 of claims ranked as Class I, entitled to priority over the government's claim, which is the sole claim ranked as Class II. Ct. App. Br. p. 34, n. 9; cf. App. 64.

[4] The insolvent's estate has $75,000 available for immediate payment in addition to the $300,000 down payment from Hennis Freight Lines. (Resp. Opp. 6.)

sion applies by its plain language. Nor is there any inconsistency with Section 199 that would justify the conclusion below that Section 3466 has been displaced in Chapter X reorganization cases. Indeed, Chapter X reorganizations are the direct statutory descendants of equity receivership proceedings, to which the applicability of Section 3466 is firmly established. An extensive review of the legislative background of Section 199—which applies in terms to reorganizations of solvent as well as insolvent debtors—reveals that the Congress was aware of the government's absolute priority in insolvency cases and had no purpose to rescind it; rather, the section was viewed as carrying forward the established practice under equity receiverships, which recognized that priority.

Section 199 speaks of "payment" as contrasted with "acceptance of a lesser amount." This contrast, illumined by the economic realities of the present case, evidently implies that the government is entitled to the maximum payment which can be made to it in view of the funds available to pay its claim. As shown above, here it received, in return for its claim, a bundle of rights worth less than $320,000; but the available funds could, and therefore should, have been allocated in a manner which would have given the United States value almost equivalent to the amount of its claim. In addition, the installment payment feature required the United States to bear whatever risks might arise relative to consummation of the plan, further reducing the present value of the government's award. It is thus clear that the government

has improperly been given "a lesser amount," rather than "payment" of its claim.

Finally, the reference in Sections 216 and 221 to "fair and equitable" treatment of creditors draws on a settled body of law under which senior creditors must be fully satisfied before junior creditors are paid, and any plan under which juniors receive something of value at the expense of senior creditors "comes within judicial denunciation." *Consolidated Rock Co.* v. *Du Bois,* 312 U.S. 510, 529. Since the present plan provides junior creditors with immediate, partial payment of their claims at the cost of requiring the government to accept delayed and therefore discounted payment of its claims and to bear the risk that the installment purchase contract will fail, it is not fair and equitable within the statutory contemplation.

I

THE UNITED STATES IS ENTITLED TO ABSOLUTE PRIORITY OF PAYMENT UNDER SECTION 3466 OF THE REVISED STATUTES

Since virtually the beginning of the Republic, Section 3466 and its predecessors have guaranteed an unqualified priority of payment for all "debts due to the United States" by an insolvent debtor.[5] This

[5] We are not concerned with the relative priority of the government's claims under Section 3466 vis-à-vis prior, specific and perfected liens upon the debtor's property at the time of insolvency, where there had been a transfer of the debtor's property and the debtor had no estate to which the government's priority could attach. Cf. *New York* v. *Maclay,* 288 U.S. 290,

policy had its roots in established English practices under which the Crown enjoyed an absolute priority over all other creditors of an insolvent debtor. This deference, attributed to royal prerogative, was based on the necessity of preserving government revenue.[6] In the United States, the sovereign priority was carried forward by explicit statutes. *United States* v. *State Bank of North Carolina,* 6 Pet. 29; *United States* v. *Oklahoma,* 261 U.S. 253. Although initially the priority was only for debts due on bond and for customs duties, see Act of July 31, 1789, c. 5, 1 Stat. 29, Section 21, by 1799 all debts due the United States out of the estate of an insolvent debtor were entitled to such priority of payment, under a statute whose language has since remained substantially unchanged. See, *e.g.,* Act of March 3, 1797, c. 20, 1 Stat. 512, Section 5, as amended by the Act of March 2, 1799, c. 22, 1 Stat. 627, Section 65.[7]

294; *United States* v. *Texas*, 314 U.S. 480, 484–485; *United States* v. *Waddill Co.*, 323 U.S. 353, 355–356; *Illinois* v. *Campbell*, 329 U.S. 362, 370–372; *Massachusetts* v. *United States*, 333 U.S. 611, 634, n. 38; *United States* v. *Gilbert Associates*, 345 U.S. 361, 365–366; *Commonwealth of Kentucky, Dept. of Rev.* v. *United States*, 383 F. 2d 13, 15 (C.A. 6). There does not appear to be any claimant in the Chapter X proceedings in the present case with prior specific liens upon the debtor's property.

[6] See 33 Hen. VIII, c. 39, § 74; 13 Eliz. I, c. 4.

[7] See also Act of August 4, 1790, c. 35, 1 Stat. 145, Sec. 45; Act of May 2, 1792, c. 27, 1 Stat. 259, Sec. 18; Act of March 3, 1797, c. 20, 1 Stat. 512, Sec. 5; Act of March 2, 1799, c. 22, 1 Stat. 627, Sec. 65.

This statutory priority is now established by Revised Statutes Section 3466, which provides as follows:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

The statutory purpose is to advance the same public policy which governed the English royal prerogative, *i.e.,* to secure an adequate revenue to sustain the public burdens and discharge the public debts. *United States* v. *Fisher,* 2 Cranch 358, 391–392; *United States* v. *State Bank of North Carolina,* 6 Pet. 29, 35. The terms of the statute are to be liberally construed to effectuate this public purpose. *Beaston* v. *Farmers' Bank,* 12 Pet. 102, 135; *Bramwell* v. *U.S. Fidelity Co.,* 269 U.S. 483, 487; *Price* v. *United States,* 269 U.S. 492, 499–501.

It is settled that a tax debt to the United States—such as is in question here—is covered by the broad language of Section 3466. *Price* v. *United States, supra,* at 499; *Spokane County* v. *United States,* 279

U.S. 80, 92–93; *Illinois* v. *United States,* 328 U.S. 8, 9; *Illinois* v. *Campbell,* 329 U.S. 362, 366–367; *Massachusetts* v. *United States,* 333 U.S. 611, 625–626. Nor is there any dispute that the debtor in this case is insolvent within the meaning of the statute. On several occasions, the debtor has admitted its insolvency, and the district court has so adjudged. The trustee was appointed following a voluntary petition by the debtor consenting to a reorganization and confessing insolvency. Likewise, the debtor's financial situation is such that upon the discontinuance of its business and the sale of its assets, the proceeds of sale will be insufficient to pay all its debts (R. 12, 23–24, 62). Thus, there have been both a voluntary assignment and an act of bankruptcy to bring this debtor within the scope of Section 3466.[8] See *United States* v. *Emory,* 314 U.S. 423.

In these circumstances, there is on the face of things no reason why Section 3466 would not apply so as to give the United States an absolute priority for the payment of this debtor's taxes. The court of appeals, however, believed that Section 199 of the Bankruptcy Act, which governs government tax claims in Chapter X reorganizations to the extent of establishing the principle that no reorganization plan may be confirmed

[8] Under Section 3a of the Bankruptcy Act, as amended (11 U.S.C. 21(a)), the fifth act of bankruptcy consists of a person having—

"* * * (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property; * * *."

unless it provides for "the payment" of such claims (or unless the Secretary of the Treasury consents to less than full payment). The court of appeals regarded Section 199 as a more specific and later enactment superseding "the more general and conflicting direction of § 3466" (R. 79).

But there is no inconsistency or anomaly in applying both sections in a Chapter X reorganization. Section 199 applies to both solvent and insolvent corporations, and provides simply that the United States cannot be compelled to accept less than full payment of its taxes. If, as here, the Secretary of the Treasury insists upon payment, the wholly separate question of priority for that payment then arises. Section 199 does not purport to answer the priority question; in the case of an insolvent corporation like the debtor here, the general provision of Section 3466 does answer it, stating that the United States is entitled to payment first if it insists upon it. Thus, far from being inconsistent, the two statutes dovetail perfectly in the situation presented by this case.[9] And, as we shall show in Part II of the Argument, the legislative history of Section 199 shows no congressional intent to displace the general priority statute; indeed, Chapter X reorganizations are the direct statutory de-

[9] Thus, Chapter X differs from liquidation bankruptcy, as to which the Bankruptcy Act prescribes in Section 64, 11 U.S.C. 104, a complete system of priorities that does plainly supersede Section 3466. See *United States* v. *Marxen*, 307 U.S. 200. There is no comparable general provision in Chapter X, and Section 102 of the Bankruptcy Act expressly makes Section 64 inapplicable to Chapter X reorganizations.

scendents of equity receivership proceedings, in which the applicability of Section 3466 was clearly established. See *Lowden* v. *N.W. National Bank,* 298 U.S. 160, 163.

Other courts of appeals have applied the unequivocal language of Section 3466 to give the United States first access to insolvents' assets in Chapter X reorganizations. *United States* v. *Anderson,* 334 F. 2d 111 (C.A. 5), certiorari denied, 379 U.S. 879; *In re Cherry Valley Homes, Inc.* 255 F. 2d 706 (C.A. 3), certiorari denied *sub nom. Du Bois* v. *United States,* 358 U.S. 864, *Reconstruction Finance Corp.* v. *Flynn,* 175 F. 2d 761 (C.A. 2), certiorari denied, 338 U.S. 819. To be sure, these cases involved non-tax debts owed to the government. But there is nothing in the simple language of Section 3466 that would provide any basis for distinguishing between tax debts and other kinds of debt.

Indeed, in *United States* v. *Anderson, supra,* the Fifth Circuit reasoned from the assumption that the government would have Chapter X priority in tax debt cases to its conclusion on the only disputed point, whether it also had priority as to non-tax debts. The government's claims in the Chapter X proceedings in *Anderson* included tax as well as non-tax debts; the district court accorded the tax debts priority and denied it only as to the non-tax debts. 334 F. 2d at 113, n. 2. Then it was argued in the court of appeals that this differentiation was proper, because Section 199 specifically provided for tax debt priority in Chapter X proceedings, but there was no similar statement regarding other government debts. The

Fifth Circuit refused to draw that inference in light of the long history of undifferentiated government priority under Section 3466 of the Revised Statutes and the distinct functions of Section 199 in cases not involving insolvency. *Id.* at 116–117.[10]

II

THE HISTORY OF CHAPTER X GENERALLY, AND SECTION 199 IN PARTICULAR, SHOWS NOT ONLY THAT THE ABSOLUTE FEDERAL PRIORITY IS UNIMPAIRED BUT ALSO THAT THE UNITED STATES HAS INDEPENDENT RIGHTS NOT SATISFIED IN THE DECISION BELOW

A. THE HISTORY

Until the enactment of the first federal corporate reorganization provisions in 1933 and 1934, the principal method of reorganizing insolvent corporations was the federal equity receivership. This was a judge-made procedure developed in the nineteenth century to protect railroads from dismemberment by their creditors. Unlike ordinary bankruptcy, this procedure was designed to rehabilitate a debtor in financial straits and to preserve its business as a going concern. Briefly, the court created a receivership to prevent the corporation's creditors from enforcing their claims against the property of the debtor; a judicial sale was held of that property to the creditors, free

[10] It would be anomalous if the government were entitled to a priority in payment of the full amount of its nontax claims but denied this priority for its tax claims, nothwithstanding that Congress has given the government greater protection for its tax and customs claims than for its other claims.

of the old debts; and the property was conveyed by the creditors to a new company formed for the purpose of carrying on the enterprise. The court's jurisdiction was founded on the existence of a limited fund which was less than the claims against it, thus necessitating the intervention of the court to assure an equitable distribution among the creditors. See, Finletter, *The Law of Bankruptcy Reorganization,* pp. 1–17 (1939).

A long line of cases established that Section 3466 of the Revised Statutes gave the United States—as its literal language suggested—an absolute priority for payment of debts due it from an insolvent corporation in equity receivership. *E.g., Price* v. *United States,* 269 U.S. 492, 502–503; *United States* v. *Butterworth Corp.,* 269 U.S. 504, 513; *Spokane County* v. *United States,* 279 U.S. 80; *New York* v. *Maclay,* 288 U.S. 290; *United States* v. *Emory,* 314 U.S. 423, 433; *Illinois* v. *Campbell,* 329 U.S. 362, 366–367; *United States* v. *Gilbert Associates,* 345 U.S. 361, 365. See also, Blair, *The Priority of the United States in Equity Receiverships,* 39 Harvard L. Rev. 1 (1925).

The first corporate reorganization statute was the Act of March 3, 1933, c. 204, 47 Stat. 1467, Section 1, which added Section 77 to the Bankruptcy Act to regulate railroad reorganizations. It brought railroads under the jurisdiction of the bankruptcy court, but with a procedure radically different from that of a liquidating bankruptcy and more closely resembling equity receivership. See H. Rep. No. 1897, 72d Cong.,

2d Sess., pp. 5, 8 (S.L.A. 18–19) [11]; S. Rep. No. 1215, 72d Cong., 2d Sess. (S.L.A. 20–38). Insofar as is relevant here, Section 77(e)(1), as enacted in 1933, provided:

> If the United States of America is directly a creditor or stockholder, the Secretary of the Treasury is hereby authorized to accept or reject a plan in respect of the interests or claims of the United States.

This provision was not intended to affect the priority of the government's claims. It resulted, instead, from two prior rulings of the Attorney General that the Secretary of the Treasury lacked authority to compromise claims of indebtedness owed to the government by the railroads. 33 Op. A. G. 423 (1923) (S.L.A. 1–6); 34 Op. A. G. 108 (1924) (S.L.A. 7–13). The Secretary requested Congress to give him such authority, and Section 77(e)(1) did so. See Criticisms and Suggestions Relating to H.R. 14359 and S. 5551, Amending the Bankruptcy Act (1933), pp. 19–20 (S.L.A. 16–17).

The Act of June 7, 1934, c. 424, 48 Stat. 911, Section 1, added Section 77B to the Bankruptcy Act in order to extend these reorganization procedures to private corporations generally. It too adopted the general concepts of equity receivership. See H. Rep. No. 194, 73d Cong., 1st Sess. (S.L.A. 39–51); S. Rep. No. 482, 73d Cong., 2d Sess. (S.L.A. 52–66). Section

[11] "S.L.A." references are to a separately bound Supplemental Legislative Appendix, copies of which are being lodged with the Clerk and served upon counsel for the respondent. It includes legislative materials not readily available elsewhere.

77B(e)(1), like Section 77(e)(1), authorized the Secretary of the Treasury to accept or reject a plan.

In 1935, the Secretary of the Treasury called the attention of Congress to the fact that lower federal courts were interpreting Section 77B(e)(1) to defeat the government's priority, placing it in the status of a general creditor with regard to its claims for taxes; as a result, the government ran a risk of losing millions of dollars of tax revenues. In order to remedy this situation, Congress amended Section 77B(e)(1) by the Act of August 29, 1935, c. 809, 49 Stat. 965, 966, which introduced the predecessor of Section 199, as follows:

> If the United States of America is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the Secretary of the Treasury is hereby authorized to accept or reject a plan in respect of the interests or claims of the United States. If, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or custom duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance of a lesser amount by the Secretary of the Treasury certified to the court: *Provided,* That if the Secretary of the Treasury shall fail to accept or reject a plan for more than ninety days after receipt of written notice so to do from the court to which the plan has been proposed, accompanied by a certified copy of the plan, his consent shall be conclusively presumed.

See S. Rep. No. 953, 74th Cong., 1st Sess. (S.L.A. 67); H. Rep. No. 1366, 74th Cong., 1st Sess. (S.L.A. 68–70); S. Rep. No. 1386, 74th Cong., 1st Sess. (S.L.A. 71–74).[12]

A similar amendment was made to Section 77(e), relating to railroad reorganizations, by the Act of June 26, 1936, c. 833, 49 Stat. 1969. In pertinent part, S. Rep. No. 1985, 74th Cong., 2d Sess., pp. 2–3 (S.L.A. 76–77), stated as follows with respect to that amendment:

> Since the beginning of our Federal Government, Congress has consistently maintained a policy of preferring claims of the United States in insolvency and bankruptcy proceedings over those of general creditors. Section 3466 of the Revised Statutes (U.S.C., title 31, sec. 191) requires that debts due the United States shall

[12] When the bill was before the Senate, Senator Burke, the floor manager, explained it as follows (79 Cong. Rec. 14101):

"* * * [Under] section 77B of the Bankruptcy Act, the Secretary of the Treasury is authorized to accept or reject corporation reorganization plans in which the United States is interested. It was assumed when that act was passed that the United States Government would have preferential treatment in its claims for taxes, customs duties, and so forth, but the courts have held otherwise. So, at the request of the Treasury Department, identical bills were introduced in the House and Senate to make that point clear."

As for the operation of the provision, Senator Gerry asked (*ibid.*): "And that prevents a reorganization until the taxes have been paid?" Senator Burke responded (*Id.*, pp. 14101–14102):

"Yes; or until the Secretary of the Treasury has agreed, on behalf of the Government, to accept a percentage, or to waive the claim altogether. The reorganization may not be put through, if the United States has a claim for taxes or customs duties, without the consent of the Secretary of the Treasury."

be satisfied first, where a debtor's or decedent's estate is insolvent. In recognition of the policy of that provision, and of the underlying necessity for protecting the revenues of the Government against the contingencies of insolvency, the Supreme Court has given it a liberal construction, and held that the word "debts" includes unpaid taxes (*Price* v. *United States,* 269 U.S. 492 (1926)). This policy is further manifested in the provisions of all of the bankruptcy acts enacted by Congress (*City of Waco* v. *Bryan,* 127 Fed. 79 (C.C.A. 5th, 1904)). * * *

* * * * *

It will be noted that S. 3841 is much more flexible and much less drastic than either section 3466 of the Revised Statutes, or section 64 of the Bankruptcy Act. The former gives a first claim upon the assets of the insolvent's estate to debts due the United States. The latter gives both to tax claims and to other debts due the United States (which are entitled to priority under section 3466) a definite place among those debts which are preferred over the claims of general creditors. S. 3841, on the other hand, like the amendment to section 77B, gives to the President, or the officer designated by him, an opportunity to accede to any proposition which protects the revenue, and which, at the same time, is not so burdensome upon the debtor as to impair its ability to regain a sound financial status. The bill entitles the Government to preferred treatment only as to claims for taxes and customs duties. Such treatment is not accorded other debts due the United States, in spite of

> the fact that Congress' continued policy would so warrant.

See also, H. Rep. No. 2926, 74th Cong., 2d Sess., pp. 4–6 (S.L.A. 78–80).[13]

The legislative history of the Chandler Act, which is the basis of the present Bankruptcy Act, shows clearly that Congress was fully aware of the extent to which the priority of payment of the government's tax claims were protected under Section 3466 and was specifically concerned to provide protection to the government not only as to insolvent debtors, but more generally as to all debtors involved in Chapter X reorganizations.[14]

The first draft bill was prepared in 1932 (S.L.A. 87–93). It included a provision, Section 76, dealing

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[13] A similar provision was included in Chapter XV, Section 722 of the Bankruptcy Act, as amended, as added by the Act of July 28, 1939, c. 393, 53 Stat. 1134, relating to the voluntary adjustment of railroad obligations. See Senate Hearings before the Committee on Interstate Commerce on Railroad Reorganization Act of 1939, 76th Cong., 1st Sess., pp. 78–80 (1939) (S.L.A. 82–84); S. Rep. No. 489, 76th Cong., 1st Sess., p. 6 (S.L.A. 85); H. Conference Rep. No. 1320, 76th Cong., 1st Sess., p. 8 (S.L.A. 86).

[14] Extensive hearings were held by Congress through the 1930's to consider a general revision of the Bankruptcy Act. These ultimately resulted in the Act of June 22, 1938, c. 575, 52 Stat. 840, the so-called Chandler Act. At the same time Congress was also concerned with the plight of many classes of debtors caused by the depression. As a result, various provisions for the relief of debtors were included in the draft proposals for a general revision of the Bankruptcy Act and, concurrently, a number of bills were separately introduced to provide immediate relief for special classes of debtors. Sections 77 and 77B resulted from such bills.

with corporate reorganizations, but did not refer specifically to the payment of federal taxes. The next five drafts were prepared by the National Bankruptcy Conference. The first three of these, all prepared in 1933, provided for corporate reorganizations in a proposed Section 78. The first draft (S.L.A. 94–96) made no reference to payment of federal taxes; but the second (S.L.A. 97–99) and third drafts (S.L.A. 100–102) each would have authorized the Secretary of the Treasury to represent the United States and to accept or reject a proposed plan, as in the initial version of Section 77B(e)(1). The fourth (S.L.A. 103–109) and fifth Bankruptcy Conference drafts (S.L.A. 110–114), prepared in 1935 and 1936, respectively, dealt with corporate reorganizations in a proposed Section 12 as part of a package of various debtor relief provisions, but omitted the provision authorizing the Secretary to accept or reject plans. The fifth draft was introduced into the House by Representative Chandler as H.R. 10382, 74th Cong., 2d Sess. (S.L.A. 110–114).

Later in that session, the same Congress considered H.R. 12889 (S.L.A. 115–121). The proposed Section 12(II)d(5) of this bill, also drafted by the National Bankruptcy Conference, spelled out in detail the authority of the Secretary to represent the United States, but omitted any requirement that taxes must be paid in full, since the Conference opposed continuation of these rights to the government. Congress, however, disagreed, and Section 12(II)h(5) of H.R. 6439, 75th Cong., 1st Sess. (S.L.A. 122–123), introduced approximately one year later, contained a provision for

payment of tax claims almost identical with the present Section 199 and similar to Section 77B(e)(1) as it had been amended by the 1935 Act (see p. 17, *supra*). The final bill, H.R. 8046, 75th Cong., 3d Sess. (S.L.A. 127–128), was introduced in 1937 and enacted in 1938; it transferred the corporate reorganization provisions from Section 12 to a separate Chapter and included Section 199 in its present form.

During the hearings on the various bills very little opposition was expressed to the reinstatement of the Government's right either to a priority of payment or to full payment of taxes. One member of the National Bankruptcy Conference who had helped draft the legislation stated his opposition to the inclusion of such a provision as follows (House Hearings Before the Committee on the Judiciary on the Revision of the Bankruptcy Act, 75th Cong., 1st Sess., p. 298 (1937)) (S.L.A. 124–126):

> This bill puts it in the power of the Government to veto any plan, if it is a creditor. I think that Mr. Teitelbaum will mention that point, but the point is just this, that if the Government is a creditor, it seems to me that it should not be able to say "No", and block a whole plan—it ought to say "No", and have its no counted with the other yeas and noes, and if two-thirds vote "Yes", the Government should be bound.

The Assistant General Counsel of the Treasury refuted the allegations that retention of the government's existing priority under Section 77B(e)(1)

would hamstring reorganizations, as follows (House Hearings, *supra,* pp. 350–351) (S.L.A. 125):

> Now that provision, I believe, has worked very well in practice. I am informed that there is not a single case in which a reorganizing debtor has been forced into liquidation because of inability to arrive at a fair and proper settlement of the governmental tax claim with the officials of the Treasury Department. If the plan of reorganization failed, it has been for some other reason. The Treasury Department has proceeded upon this principle: It has recognized the objective of Congress in the enactment of 77B to enable enterprises which are in trouble to get back onto their feet. On the other hand, the Department has felt that it was not the intention of Congress in enacting that legislation that private pocketbooks should be enriched at the expense of the Treasury of the United States.

Finally, it was clear to all that the proposed Section 199 would carry forward the practice under equity receiverships and Section 77B. Thus, a member of the National Bankruptcy Conference stated (Senate Hearings before a Subcommittee of the Committee on the Judiciary on the Revision of the National Bankruptcy Act, 75th Cong., 2d Sess., p. 77 (1938) (S.L.A. 130)):

> Section 64 of the general bankruptcy act, for example, provides for a fixed priority in the payment of claims. This section deals solely with unsecured claims, only unsecured claims being affected by bankruptcy. To apply it in

> corporate reorganizations—where secured as well as unsecured claims are dealt with—would cause great confusion. To make it clear that section 64 does not apply, we propose this amendment which expressly provides that 64 shall not be applicable to chapter X. The priorities under chapter X would therefore be those used in equity receiverships. That is the present practice under 77B, which expressly provides that section 64 shall not be applicable. When we adopt the same provision here we merely adopt the practice which is already in existence under section 77B.

And Congress made the history and purpose manifest in explaining the form of Section 199 in the final bill, stating (H. Rep. No. 1409, 75th Cong., 1st Sess., p. 55) (S.L.A. 132)):

> Section 199 of chapter X contains in virtually identical form, the provision in section 77B of the act authorizing the Secretary of the Treasury—where the United States of America is a creditor or stockholder of the debtor—to accept or reject a plan in respect of the claims or rights of the United States. * * *

See also S. Rep. No. 1916, 75th Cong., 3d Sess., p. 32 (S.L.A. 133).

B. THE ABSOLUTE PRIORITY THAT THE UNITED STATES HAD IN EQUITY RECEIVERSHIPS UNDER SECTION 3466 IS PRESERVED IN CHAPTER X REORGANIZATIONS OF INSOLVENT CORPORATIONS

The legislative history of the enactment of Chapter X, and particularly of Section 199, emphasizes two points—(1) that corporate reorganizations were not derived from the precedents of liquidating bankruptcy, but had their origins in equity receiverships

and similar debtor relief proceedings,[15] and (2) that when it enacted Section 199 Congress did not intend to eliminate the priority as to all debts of insolvents which the United States had in equity receiverships under Section 3466. Section 199 was necessary because, *inter alia,* the existing priorities established by Section 3466 aided the government only if the corporation undergoing reorganization was insolvent within the meaning of that statute; it was necessary to have general rules applicable to all Chapter X reorganizations. We have found no indication of any Congressional intention that Section 199 or any other provision of Chapter X was intended to supersede the generally applicable provisions of Section 3466, which had—as we have shown, *supra,* p. 15—been universally recognized in the equity proceedings from which Chapter X arose. Congress was aware of the United States' existing priority under Section 3466, and intended to supplement rather than impair it. See *United States* v. *Anderson, supra.*

C. EVEN IF SECTION 199 SUPERSEDED SECTION 3466, ITS PROVISION FOR "PAYMENT" OF THE GOVERNMENT'S TAX CLAIMS IN ITSELF EMBODIES A PRIORITY WHICH WAS NOT SATISFIED BY THE REORGANIZATION PLAN APPROVED IN THIS CASE

Even if this Court should determine that Section 199 does supersede Section 3466 in Chapter X reorga-

[15] This Court pointed out in *Lowden* v. *N. W. National Bank,* 298 U.S. 160, 163:

"A proceeding to reorganize is not a bankruptcy, though an amendment to the bankruptcy act creates and regulates the remedy."

See *Central States Electric Corp.* v. *Austrian,* 183 F. 2d 879, 886 (C.A. 4), certiorari denied, 340 U.S. 917. See also Part III of the argument, *infra.*

nizations, it remains clear from the legislative history that Congress acted in Section 199 to preserve generally, at least as to tax debts, the rights which the United States had previously enjoyed in equity receiverships. In Collier, *Bankruptcy,* Vol. 6A (14th ed. 1969), Section 9.17, this is stated as follows (pp. 269-270):

> The second sentence of § 199 establishes a first priority in payment for claims of the United States for taxes or customs duties, either secured or unsecured, irrespective of whether the United States has any other interest in or claim against the debtor. The priority thus conferred is superior to all other claims against the estate, even to existing and perfected liens which might otherwise be prior. * * *

See also, Finletter, *The Law of Bankruptcy Reorganization* (1939), pp. 1–35, 385, 404. Indeed, the preference over secured claims provided by Section 199 exceeds the general preference given by Section 3466.

The priority given by Section 199 is embodied in the contrast it draws between "payment" and "acceptance of a lesser amount." The comparison made implies that the government is entitled to the maximum payment which can be made to it in view of the funds available to pay its claim. Any other payment would be a "lesser amount" which the Secretary is entitled to refuse.

In the present case, the purchase by Hennis and other funds in the trustees' hands made $375,000 available for immediate distribution to creditors. Only a small proportion of that sum—respondent suggested $105,000 below—could be claimed for administrative

expenses and the small amount of wage claims placed in Class I, ahead of the government in priority of claim. Thus, it would have been possible to pay the government at least $270,000 at once, plus as many of the monthly installments (of $8140 each) as were required to make up the balance of its $375,386.55 claim. Instead, the government is to be paid $37,538.66 in cash and $4,331.38 monthly for 78 months.

This is payment of a "lesser amount" in several respects. As shown above, the rights conferred would have substantially lower present economic value than immediate payment, even if it were certain that the monthly installments would be paid. Moreover, the monthly installment plan requires the United States to assume whatever risks may arise relative to consummation of the plan—for example, that the purchaser will remain solvent throughout the 78 month period and that the collateral for the installment payments, the operating rights, will retain its value. These risks reduce the value of the government's rights still further and thus make it even clearer that it is being required to accept a "lesser amount."

The courts below came to a different conclusion, that the "payment" obligation was satisfied by any scheme which promised to return to the government, as a simple sum, the amount owed it. That reasoning depended in part on the proposition that the United States is not allowed post-petition interest on its claim, *United States* v. *Edens,* 189 F. 2d 876 (C.A. 4), affirmed *per curiam,* 342 U.S. 912, and that rec-

ognition of any difference in value between available modes of paying the government's claim would amount to the payment of such interest. While the first proposition is correct, the second is economically unsound. The roughly $375,000 due to the government cannot now be expanded by assessment of interest on that amount, despite the considerable delay since the insolvency proceedings began; but the government is entitled to its full claim unless the Secretary agrees to accept less, and there is no blinking the fact that under the plan as approved he will be receiving less.

Accordingly, we submit that even if the government has no absolute right to *first* payment under Section 3466, its right to *full* payment under Section 199 entitles it to no less payment than is available at any stage of the proceedings. At the very least, the government is entitled to compensation for the reduced present value of the payments planned to be made in the future.[16]

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[16] The hypothesis that the government receives "payment" under Section 199 so long as it receives all the moneys due to it at some point in time, without reference to when other creditors are paid, leads to an unacceptable result if the element of risk is also considered. Delaying payment to the government relative to other creditors imposes on it an unequal risk of loss if the transaction fails of completion after it has been only partially consummated. Once the juniors were paid, it would be difficult if not impossible for the government to secure satisfaction from them if the risk then materializes. From this perspective, the requirement of full payment would be diaphanous indeed. Congress must have recognized that such a requirement was workable only in conjunction with a right to priority of payment.

III

THE "FAIR AND EQUITABLE" RULE OF SECTIONS 216 AND 221 REQUIRES THAT A TAX CLAIM OF THE UNITED STATES BE PAID BEFORE THE CLAIMS OF LOWER RANKING CREDITORS

The court of appeals considered that giving the United States priority would conflict with Sections 216(7)(d) and 221(2) of the Bankruptcy Act, which require that a plan of reorganization under Chapter X must, in substance, be fair, equitable and feasible. In its construction of the fair and equitable rule, however, the court in effect eliminated the well established distinctions between senior and junior creditors, holding the government entitled to nothing more than reasonable protection. This violated the settled principle that the fair and equitable rule is applicable not to the body of creditors as a whole, but on a class-by-class basis, treating the senior claims first. Each class of claims must be satisfied in full for the rights surrendered, in descending order, before the next junior class may properly be paid in the distribution. If junior creditors receive something of value at the expense of the senior creditors, the plan is not fair and equitable but "comes within judicial denunciation." *Consolidated Rock Co.* v. *Du Bois,* 312 U.S. 510, 529. That in effect is the result of the plan approved below, which is therefore inconsistent even with the rule upon which it purports to be based.

A. THE MEANING OF THE FAIR AND EQUITABLE RULE

Although Chapter X envisages that a reorganization plan will alter or modify the rights of creditors

and stockholders, it imposes conditions on the extent of modification and alteration possible vis-a-vis the rights of others, in order to protect the relative standing which various classes of creditors and equity holders enjoy. Thus, Section 197, 11 U.S.C. 597, requires the reorganization judge to classify creditors and stockholders "according to the nature of their respective claims and stock," and this requirement is understood to call for an ordering based on the priority of claim of the various classes to the debtor's assets. Under Section 216(7)(d), 11 U.S.C. 616(7)(d), if any class of creditors affected by the plan does not accept it, the plan must assure "adequate protection for the realization by them of the value of their claims * * * by such method as will * * * equitably and fairly provide such protection."[17] And Section 221(2) of the Act, 11 U.S.C. 621(2), provides as a condition of confirmation of a plan that the court be "satisfied" that "the plan is fair and equitable, and feasible."

The repeated statement in the Act of the requirement that a Chapter X plan be "fair and equitable"

[17] Since generally, if not inevitably, the United States is the sole member of the class of creditors to which it belongs, the provision for acceptance of the plan by a vote of two-thirds of the amount of debt held by the class is irrelevant to it; the provision thus amounts to a statement that if it rejects a plan, the plan can be adopted only if it equitably and fairly protects the government's realization of the value of its claims. In view of the specific mandate of Section 199 on this issue, it might appear that the section is redundant as to the government in tax cases such as this. Section 221 evidently is not redundant, however, since it makes separate reference to Section 199 and the fair and equitable rule.

draws on a settled tradition of according creditors absolute priority over stockholders in equity proceedings involving a debtor's estate. See, *e.g.*, *Mumma* v. *The Potomac Co.*, 8 Pet. 281, 286–287; *Curran* v. *State of Arkansas*, 15 How. 304, 307–308; *Railroad Co.* v. *Howard*, 7 Wall. 392, 409–410. That principle was regularly applied in the equity receivership proceedings which were the historical source of Chapter X. Thus, in *Northern Pacific Ry.* v. *Boyd*, 228 U.S. 482, a general creditor who was denied participation in the reorganized company sought recovery of the amount of his claim against the new corporation on the ground that by permitting the stockholders to participate in the plan, the latter had received assets belonging to the unsecured creditors. This Court agreed, holding that the reorganizers were bound to recognize the superior rights of the general creditors, and stated, in part, as follows (228 U.S. at 504–505):

> For, if purposely or unintentionally a single creditor was not paid, or provided for in the reorganization, he could assert his superior rights against the subordinate interests of the old stockholders in the property transferred to the new company. * * * The property was a trust fund charged primarily with the payment of corporate liabilities. Any device, whether by private contract or judicial sale under consent decree, whereby stockholders were preferred before the creditor was invalid. * * * "* * * Any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the ex-

> pense of the prior rights of either class of creditors comes within judicial denunciation."

The opinion then set forth what has since become known as the absolute priority rule (at 508):

> If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever.

The absolute priority rule was carried forward to govern corporate reorganizations under Section 77B of the Bankruptcy Act. As this Court stated in *Case* v. *Los Angeles Lumber Co.* 308 U.S. 106, 115–116, rehearing denied, 308 U.S. 637:

> The words "fair and equitable" as used to § 77B(f) are words of art which prior to the advent of § 77B had acquired a fixed meaning through judicial interpretations in the field of equity * * * reorganizations. * * *
>
> In equity reorganization law the term "fair and equitable" included, *inter alia,* the rules of law enunciated by this Court in the familiar cases of *Railroad Co.* v. *Howard,* 7 Wall. 392; *Louisville Trust Co.* v. *Louisville, N.A. & C. Ry.* Co., 174 U.S. 674; *Northern Pacific Ry. Co.* v. *Boyd,* 228 U.S. 482; *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co.,* 271 U.S. 445. These cases dealt with the precedence to be accorded creditors over stockholders in reorga-

> nization plans. In *Louisville Trust Co.* v. *Louisville, N.A. & C. Ry. Co., supra,* this Court reaffirmed the "familiar rule" that "the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors." * * *

One of the arguments made in *Case,* as in the courts below, was that the absolute priority rights of a dissenting class need not be recognized if a substantial majority of the creditors as a whole had voted for a plan. This Court rejected that argument in strong terms, holding as a matter of law that the rights of the senior ranking creditors must be observed (at 114):

> * * * [W]here a plan is not fair and equitable as a matter of law it cannot be approved by the court even though the percentage of the various classes of security holders required by § 77B(f) for confirmation of the plan has consented. It is clear from a reading of § 77B(f) that the Congress has required both that the required percentages of each class of security holders approve the plan and that the plan be found to be "fair and equitable." The former is not a substitute for the latter. The court is not merely a ministerial register of the vote of the several classes of security holders. All those interested in the estate are entitled to the court's protection. Accordingly the fact that the vast majority of the security holders have approved the plan is not the test of whether the plan is a fair and equitable one. * * *

In *Consolidated Rock Co.* v. *Du Bois,* 312 U.S. 510, this Court referred to the absolute priority rule as follows (at 520–521):

> The full and absolute priority rule of *Northern Pacific Ry. Co.* v. *Boyd,* 228 U.S. 482, and *Case* v. *Los Angeles Lumber Products Co., supra,* would preclude participation by the equity interests in any of those assets until the bondholders had been made whole. * * *

Subsequently, *Marine Properties* v. *Trust Co.,* 317 U.S. 78, 85, 86–87, applied the absolute priority rule to Chapter X. See *Group of Investors* v. *Milwaukee R. Co.,* 318 U.S. 523, 569, 571; *Central States Electric Corp.* v. *Austrian,* 183 F. 2d 879, 885–888 (C.A. 4), certiorari denied, 340 U.S. 917; *Petition of Portland Electric Power Co.,* 162 F. 2d 618, 622 (C.A. 9), certiorari denied *sub nom. Watson* v. *Portland Electric Power Co.,* 332 U.S. 837; *Spitzer* v. *Stichman,* 278 F. 2d 402 (C.A. 2). See also, Collier *op. cit. supra,* Vol. 6A, Section 11.06; Remington, *Bankruptcy* (1961 Rev.), Vol. 11, Section 4584.

Thus, the requirement of fair and equitable treatment is a requirement that creditors having different priorities be separately classified under Section 197 and given the different priority rankings to which their claims entitle them. *Kyser* v. *MacAdam,* 117 F. 2d 232, 237 (C.A. 2); *St. Louis Union Trust Co.* v. *Champion Shoe Mach. Co.,* 109 F. 2d 313, 316 (C.A. 8). A plan is not fair and equitable if creditors of a junior class receive something of value at the expense of a senior class. *In re Utilities Power & Light Corp.,* 29 F. Supp. 763, 769 (N.D. Ill.).

> Any arrangement by which a junior class receives values allocable to a senior class "comes within judicial denunciation." Beginning with the topmost class of claims against the debtor,

each class in descending rank must receive full and complete compensation for the rights surrendered before the next class below may properly participate. [Collier, *op. cit. supra,* Vol. 6A, Section 11.06, pp. 613–617; see also *id.* at 619.]

The court of appeals' conclusion that a grant of priority to the United States would conflict with the "fair and equitable" provisions of Sections 216 and 221 rests on its failure to accept this settled meaning. The court appears to have started from the premise that the fair and equitable rule entitled it to balance interests of junior creditors against those of senior creditors to achieve a suitable compromise—in effect, protecting lower ranking creditors at the expense of those with prior rights. But this Court has made it abundantly clear that compromising the rights of senior creditors to protect their juniors is the antithesis of fair and equitable treatment within the statutory contemplation, whether or not it might appeal to a disembodied sense of justice.[18] See *Case* v. *Los Angeles Lumber Co., supra,* at 114; *Consolidated Rock Co.* v. *Du Bois, supra,* at 520–521, 527, 528–529;

[18] Thus it is irrelevant whether the junior unsecured creditors have, by agreeing to the plan, given up a portion of the dividend they might have expected in the event of liquidation in bankruptcy. It may be noted, however, that the hypothetical bankruptcy distribution would not be made until all priority claims had been satisfied—that is, in the last part of the 78 months installment payment period. Depending on prevailing interest rates and the degree of risk that the installment purchase agreement would be abandoned, a present right to 20 percent could be more valuable than a future expectancy of 27 percent or 32 percent. Indeed, it is the fact that the government as senior creditor has been made to absorb this discount and risk which prompts the present appellate proceedings.

Marine Properties v. *Trust Co.*, 317 U.S. 78, 85–86; *In re 620 Church St. Corp.*, 299 U.S. 24, 27; *Group of Investors* v. *Milwaukee R. Co.*, 318 U.S. 523, 556–558, 562–563, 564–566, 569. See also, Collier *op. cit. supra*, Vol. 6A, Section 11.06, pp. 613–617. When the fair and equitable rule is given the meaning established by this Court's repeated decisions, there is no conflict. Section 3466 establishes the United States as a senior ranking creditor; Section 199 assures that a proposed plan will provide for payment in full of the government's tax claim unless it consents to a reduction; and Sections 216 and 221 aid in determining whether the method of payment adopted satisfies the government's priority rights.

B. THE FAIR AND EQUITABLE RULE IS NOT SATISFIED BY THE REORGANIZATION PLAN APPROVED IN THIS CASE

A reorganization plan "comes within judicial denunciation" under the fair and equitable rule, *Consolidated Rock Co.* v. *Du Bois, supra*, at 529, if it provides junior creditors with something of value at the senior creditors' expense. The present plan calls for such denunciation since it provides junior creditors with immediate, partial payment of their claims at the cost of requiring the government to accept delayed (and therefore discounted) payment of its claims and to bear the risk that the installment purchase contract will fail.

The point, again, is that a choice has been made to favor others at the government's expense. Thus, this is not a case in which the government's priority is recognized but there is only a small amount of cash

on hand to provide a down payment; nor even one in which both junior and senior creditors share ratably in available cash, installment, or security interests. Here, a large sum of money—$375,000—is available for immediate payment, and junior creditors have been given preferential access to it. By requiring the government to accept installment payments, without interest, over a period of 78 months, the court has allotted it substantially less value than it would receive if it shared in the down-payment funds to the extent its priority suggests, or even equally with the other creditors. As senior creditor, it cannot be required to forego part of its rights, the right to be paid out of the first available funds, at least without receiving equivalent compensation in return. *Consolidated Rock Co.* v. *Du Bois, supra; Group of Investors* v. *Milwaukee R. Co.,* 318 U.S. 523; *Petition of Portland Electric Power Co.,* 162 F. 2d 618 (C.A. 9). See also Collier, *op. cit. supra,* Vol. 6A, Section 11.06, pp. 620–621; *Spitzer* v. *Stichman,* 278 F. 2d 402, 405 (C.A. 2). See also, *Protective Committee* v. *Anderson,* 390 U.S. 414, 424. Cf. *Standard Gas & Electric Co.* v. *Deep Rock Oil Corp.,* 117 F. 2d 615, 617 (C.A. 10), certiorari denied, 313 U.S. 564.

We recognize that compromises are "a normal part of the process of reorganization." *Case* v. *Los Angeles Lumber Co., supra,* at 130; *Protective Committee* v. *Anderson,* 390 U.S. 414, 424. We also recognize that lower ranking creditors are not prevented from bargaining their consent to a plan for a higher return on

their claims, and that higher ranking creditors may accept an extended payment or a smaller amount for their claims in order to induce a settlement and to avoid the delays and hazards of protracted court proceedings. On the other hand, as this Court recently emphasized in *Protective Committee* v. *Anderson, supra,* at 424, even in such circumstances the reorganization court has the responsibility of scrutinizing the merits of compromises "to determine that a proposed compromise forming part of a reorganization plan is fair and equitable. *In re Chicago Rapid Transit Co.,* 196 F. 2d 484 (C.A. 7th Cir. 1952)." There is even greater reason for applying the fair and equitable rule where, as here, a priority creditor, such as the United States, refuses to accept a compromise of its rights, as it is permitted by statute to do.

Finally, there is the least possible basis for requiring the government to assume any risk in this case, for the debtor here is no longer operating its business. Whether or not the business could be forced into liquidation, rather than reorganized, is thus a matter of complete indifference to the government, and there is no justification for favoring general creditors in the apportioning of risk and delay. Confirming this plan as "fair and equitable" would only suggest to proponents of future plans, where continuation might appear feasible, that the government could be subjected to even greater discounts and risks. Such a result is entirely inconsistent with the bankruptcy statutes and the interpretation which they have consistently received in this Court.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

PETER L. STRAUSS,
Assistant to the Solicitor General.

CROMBIE J. D. GARRETT,
KARL SCHMEIDLER,
Attorneys.

DECEMBER 1969.

APPENDIX

Revised Statutes:

> SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.
>
> (31 U.S.C. 191.)

Bankruptcy Act, c. 541, 30 Stat. 544 [as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840]:

> SEC. 102. The provisions of chapter I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That section 23, subdivisions h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. * * *
>
> (11 U.S.C. 502.)
>
> SEC. 107. Creditors or stockholders or any class thereof shall be deemed to be "affected"

by a plan only if their or its interest shall be materially and adversely affected thereby. In the event of controversy, the court shall after hearing upon notice summarily determine whether any creditor or stockholder or class is so affected.

(11 U.S.C. 507).

SEC. 115. Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature.

(11 U.S.C. 515.)

SEC. 197. For the purposes of the plan and its acceptance, the judge shall fix the division of creditors and stockholders into classes according to the nature of their respective claims and stock. * * *

(11 U.S.C. 597.)

SEC. 199. If the United States is a secured or unsecured creditor or stockholder of a debtor, the claims or stock thereof shall be deemed to be affected by a plan under this chapter, and the Secretary of the Treasury is hereby authorized to accept or reject a plan in respect of the claims or stock of the United States. If, in any proceeding under this chapter, the United States is a secured or unsecured creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against the debtor, as secured or unsecured creditor or stockholder), no plan which does not provide for the payment thereof

shall be confirmed by the judge except upon the acceptance of a lesser amount by the Secretary of the Treasury certified to the court: *Provided,* That if the Secretary of the Treasury shall fail to accept or reject a plan for more than ninety days after receipt of written notice so to do from the court to which the plan has been proposed, accompanied by a certified copy of the plan, his consent shall be conclusively presumed. (11 U.S.C. 599.)

SEC. 216. A plan of reorganization under this chapter—

(1) shall include in respect to creditors generally or some class of them, secured or unsecured, and may include in respect to stockholders generally or some class of them, provisions altering or modifying their rights, either through the issuance of new securities of any character or otherwise;

(2) may deal with all or any part of the property of the debtor;

(3) shall provide for the payment of all costs and expenses of administration and other allowances which may be approved or made by the judge;

* * * * *

(5) shall specify what claims, if any, are to be paid in cash in full;

* * * * *

(7) shall provide for any class of creditors which is affected by and does not accept the plan by the two-thirds majority in amount required under this chapter, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims, either as provided in the plan or in the order confirming the plan, (a) by the transfer or sale, or by the retention by the debtor, of such property subject to such claims; or (b) by a sale of such

property free of such claims, at not less than a fair upset price, and the transfer of such claims to the proceeds of such sale; or (c) by appraisal and payment in cash of the value of such claims; or (d) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection;

* * * * *

(11 U.S.C. 616).

Sec. 221. The judge shall confirm a plan if satisfied that—

(1) the provisions of article VII, section 199, and article X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

* * * * *

(11 U.S.C. 621).

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Downtown Inv. Ass'n. v. Boston Metro. Bldg., 81 F. 2d 314 (CA-1, 1936) 35

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Wilton Realty Corp., In re, 30 F. Supp. 486 (E.D. Mich., 1938), *aff'd per curiam*, 106 F. 2d 1022 (CA-6, 1938), *cert. denied sub. nom., Wilton Realty Corp. v. Weadock*, 308 U. S. 626 (1940) 36

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Blair, *The Priority of the United States in Equity Receiverships* 39 Harv. L. Rev. 1 (1925) 17

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Gilchrist, *Fair and Equitable Plan of Reorganization: A Clearer Concept*, 26 Cornell L. Q. 692 (1941) 29

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Treatises

Collier, *Bankruptcy*, (rev. ed. 1969):

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No. 402

IN THE

Supreme Court of The United States

October Term, 1969

UNITED STATES OF AMERICA,
Petitioner,

v.

SHELDON A. KEY, Trustee,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The order of the District Court for the Southern District of Indiana confirming the plan of reorganization (R. 58-63)[1] is not officially reported. The opinion of the United

[1] "R" references are to the separately bound record appendix.

States Court of Appeals for the Seventh Circuit (R. 74-80) is reported at 407 F. 2d 635. It affirmed the ruling of the District Court.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1969 (R. 81). On May 20, 1969, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including July 27, 1969, a Sunday. The petition for a writ of certiorari was filed on July 28, 1969 and was granted on October 20, 1969. The jurisdiction of this Court is conferred by 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Does the priority status of a tax claim of The United States vest in the Secretary of the Treasury the authority to defeat a plan of reorganization under Chapter X of the Bankruptcy Act by rejecting the same even though payment of the claim has been provided for pursuant to means authorized by Section 216(7)?

STATUTES INVOLVED

The pertinent provisions of the Bankruptcy Act, as amended, are Sections 199, 216, 221 and 236. The only statute involved in addition to the Bankruptcy Act is Revised Statute, Sec. 3466. The statutory provisions are set forth at pages 45 to 47 of the appendix to the Respondent's brief.

STATEMENT

The trustee (Respondent) has no objection to the United States' (Petitioner) statement (pp. 2-4, Petitioner's brief).

The trustee would elaborate on the government's statement of the case as follows:

When the debtor filed its voluntary petition in the District Court for a reorganization under Chapter X of the Bankruptcy Act, on May 3, 1954, the debtor was a general commodity carrier operating by authorization of the Interstate Commerce Commission over a network of regular routes bounded by the area included within a line extended between Milwaukee, Wis., St. Louis, Mo., Kahlo, Ill., Louisville, Ky., Pittsburgh, Pa., and points within forty miles thereof, Cleveland, Ohio, and Detroit, Mich.

The trustee filed his plan of reorganization on March 25, 1955, and the District Court approved the plan on April 5, 1955. Subsequently, the trustee modified the plan in 1956, and the plan as modified was approved on October 2, 1956, and confirmed on January 31, 1957. The modified plan, as confirmed, provided for payment in full or part of claims totalling in excess of $1,500,000, including the claim of the United States for taxes totalling $411,458.06. In brief, the plan provided for a transfer of assets to the reorganized debtor to be recapitalized in part through an underwriting agreement between the debtor and a third party whereby the latter would underwrite $1 Million of the sale of new securities of the corporation and guarantee the sale of assets up to $250,000.

The United States was classified as a Class 4 creditor under the 1956 plan and was to be paid 25% of its claim in cash on the date of consummation and the balance of said claim in four annual payments of 25% each, bearing interest at 6% per annum. The plan also provided that specified secured creditors in Classes 2 and 3 were to receive interest at the rate of 6% from July 1, 1957, to

payment. Cash payment in full was to be made on all wage claims, secured creditors, claims of governmental agencies other than for taxes and real property taxes. Other tax claimants, classified as Classes 5 and 6, received the same terms of payment as did the United States. Holders of freight and overcharge claims, on confirmation of the plan, were given a choice between 25% of their claim in cash or payment in full in the form of 5% in cash and 19 promissory notes, each representing 5% of the debt, to be paid over a period of time. The rights of the shareholders of the debtor were adjusted under the plan thereby permitting the shareholders to acquire shares in the new corporation by redemption of old shares plus cash. General unsecured creditors received a choice of 10% in cash of the face amount of their claims, on consummation, or one-quarter share of new preferred stock for each $100 in the principal amount of their claim.

The United States tendered a conditional acceptance of the plan in writing setting forth several conditions, among which was the condition that, through the District Director, it received the right under the order of confirmation to declare the entire balance due and payable on any default by the reorganized debtor in payment of its claim and collect such amount due in the manner as provided for in the Internal Revenue Code.

On January 31, 1957, the District Court confirmed the plan of reorganization, providing therein *inter alia* (1) the reservation of jurisdiction to enter orders from time to time aiding in consummation of the plan; (2) finding the debtor insolvent; (3) incorporating the conditions set forth by the United States in its conditional acceptance; and (4) directing the trustee to consummate the plan on or before June 17, 1957.

The date of consummation of the plan was subsequently extended, due to the complexity of financing agreements, through June 1, 1958. On June 1, 1958, the property and assets in possession of the trustee were vested in the reorganized debtor corporation, and the cash and shares of stock provided for under the plan were paid out as designated to the creditors involved therein.

On June 1, 1958, the reorganized debtor proceeded to operate its business without supervision of the trustee or reorganization court.

On December 6, 1961, the trustee filed his petition to declare the plan of reorganization substantially consummated and to direct a filing of his final report. At that time all claims in the proceeding had been adjudicated. The claim of the United States had been paid down pursuant to the plan, to a balance of $181,563.33, inclusive of principal and interest.

At or about the same time the reorganized debtor had entered into negotiations with Hennis Freight Lines, Inc. (hereinafter referred to as "Hennis"), a general commodity carrier doing business mainly between the southern states and the New York, Philadelphia, and New Jersey industrial centers, for a sale of its certificate of convenience and necessity issued by the Interstate Commerce Commission. On February 15, 1962, an agreement of sale was entered into between the parties providing for a sale of the Hancock operating rights to Hennis for the sum of $1 Million, inclusive of principal and interest, payable $300,000 within 90 days of approval and the balance in 78 equal monthly installments. The contract also provided in the event of cancellation of a portion of the Hancock operating rights by the Interstate Commerce Commission for a reduction in the purchase price in direct ratio to

the number of miles embraced in the cancelled rights. Pending the approval of sale by the Interstate Commerce Commission, Hennis agreed to lease the operating rights pursuant to temporary authority for the sum of $2,000 per month.

On March 5, 1962, before hearing on the trustee's petition was held, three creditors whose claims had arisen subsequent to June 1, 1958, filed a petition praying: (1) that the plan of reorganization be amended to provide for payment of creditors whose obligations arose subsequent to the confirmation of the plan; and (2) that the trustee be empowered to retake control and possession of the debtor. The petition alleged *inter alia* the insolvency of the reorganized debtor. On March 15, 1962, after due hearing, the District Court entered its order revesting the trustee with title to the property of the debtor and directing the trustee to proceed as though Chapter X proceedings had commenced.

Among the claims filed with the trustee after he reassumed possession of the property and assets of the debtor was that of the government in the total sum of $380,419.01, representing the balance due it under the plan confirmed in 1958 totalling $181,563.33, together with new liabilities incurred by the reorganized corporation, inclusive of principal and interest, totalling $197,975.40. The claim has since been reduced and allowed pursuant to stipulation in the sum of $375,386.55 (R. 71-73).

Subsequent to the return of the assets and property to the possession of the trustee, the District Court entered its order on August 10, 1962, affirming the contract of sale between Hennis and the debtor involving the sale of the debtor's interstate operating rights and authorizing the trustee to take all steps necessary to consummate the sale.

The application under Section 5 of the Interstate Commerce Act was referred to a hearing examiner who submitted his report on August 15, 1964, recommending that the sale transaction be approved providing, however, for a modification imposing certain restrictions on shipments originating from and destined to Detroit, Michigan.

The Interstate Commerce Commission issued its order approving the hearing examiner's report on March 11, 1965.

The trustee filed suit in the District Court to overrule the Interstate Commerce Commission. The three-judge court entered an order on January 12, 1967, sustaining the Interstate Commerce Commission.

Thereafter, Hennis insisted on a reduction in sale price pursuant to the terms of the contract. After extensive negotiations a modification of the original purchase agreement was entered into.

The modification provided for a purchase price to be paid by Hennis of $935,000 in lieu of the original $1 Million, payable as in the original agreement—$300,000 within 90 days of final approval and the balance of $635,000 by a note secured by a chattel mortgage on the operating rights payable in 78 equal monthly installments. The trustee agreed to submit a plan providing for payment of all administration and priority claims in full, without interest, and for settlement of all unsecured claims for 20% of the amounts due. The purchase price was to be further reduced by deducting therefrom any funds in excess of the amounts needed to satisfy the plan.

The proceeds from the sale of the operating rights under the modified agreement of sale, together with approximately $75,000 representing funds in the hands of the

trustee, formed the means of execution under the trustee's amended plan of reorganization as filed on June 23, 1967. The amended plan of reorganization classified the United States as a Class 2 creditor providing payment as follows:

> "A. Creditors in Classes 2, 3, 4, and 5.
>
> "Holders of the following claims, i.e. the United States with respect to all claims against the debtor inclusive of but not limited to taxes, The State of Indiana, Gross Income Tax Division for taxes arising under the Gross Income Tax Laws, The State of Indiana, County of Vanderburgh for personal property taxes and the State of Ohio, Department of Taxation for Highway Use Taxes shall be satisfied by the payment to said creditors of ten per cent (10%) of the amount of said claims, in cash, within six months from the date of confirmation of this plan of reorganization, and by the payment of the balance of said indebtedness in full, exclusive of interest, in seventy-eight equal monthly instalments, the first said instalment to be paid within six months after confirmation of the plan. Said instalment payments shall be secured by the assignment of note and chattel mortgage as herein after more explicitly set forth in the Means of Execution of this plan; and the rights of the creditors in the afore-mentioned classes shall be modified and altered accordingly." (R. 65).

Article VIII of the amended plan of reorganization provides security for the payment of the United States and other tax claimants by providing that Hennis will execute a note in an amount not to exceed $635,000, reduced by the amount in excess of the sum necessary to make the payments provided for under the plan.

The actual amount of the note has now been fixed in the sum of $600,968.16, representing the total amount of

the claims of the four tax creditors less the 10% to be paid on confirmation.[2] This note will be secured by a chattel mortgage on the operating rights. The aforementioned note and mortgage will be assigned by the debtor to a banking institution approved by the court as trustee for the benefit of the United States and the three other tax claimants. Hennis will make the prorated monthly payments totalling approximately $7,700 directly to the claimants rather than to the trustee.

In addition to providing for tax claimants and unsecured creditors, holders of claims for wages will be paid in cash within six months and the claims of various states for real and personal property taxes are to be paid within six months from the date of confirmation. No provision is made in the plan for stockholders, by reason of the insolvency of the debtor.

On September 7, 1967, the petition for approval of the agreement modifying the 1962 contract for sale of the debtor's operating rights to Hennis and approval of the amended plan of reorganization were brought on for hearing simultaneously. The court, after hearing the trustee's witnesses, Jesse L. Phipps, Vice President of Hennis (R. 29-34); Thomas W. Andrews, Vice President of McLean Trucking Company, Webster Division (R. 34-36); and Sheldon A. Key, trustee (R. 36-40); held that $935,000

2

Class 2, United States	$375,386.55
Class 3, State of Indiana, Gross Income Tax	31,218.91
Class 4, State of Indiana, Vanderburgh Co.	76,650.55
Class 5, State of Ohio, Highway Use Tax	184,486.39
	$667,742.40
Less 10%	66,774.24
	$600,968.16

was a fair price for the debtor's interstate operating rights and approved the agreement, to-wit:

> "ORDERED: That the modification agreement entered into between Hennis Freight Lines, Inc. and Sheldon A. Key, as trustee for Hancock Trucking, Inc., for the reduction of the purchase price relating to the sale of the interstate operating authority is approved;..." (R. 41-42).

On December 19, 1967, the District Court entered its order confirming the plan of reorganization, in part as follows:

> "11. That the provisions of Article VII, Section 199, and Article X of Chapter X of the said Act have been complied with.
>
> 12. That the said plan is fair and equitable, and feasible.
>
> 13. That adequate protection for the realization by the creditors in classes (2), (3), (4), and (5) is provided by the plan by securing the payment of their claims by an assignment of note and chattel mortgage on the operating rights to be transferred to Hennis Freight Lines, Inc., and that such method safeguards the interests of such creditors and equitably and fairly provides the protection for the payment of the claims of said creditors." (R. 62).
>
> • • •
>
> "17. That the debtor is insolvent." (R. 62).

There is no provision in the plan for any class of creditor to receive interest on its claim whatsoever.

SUMMARY OF ARGUMENT

Section 199 of the Bankruptcy Act outlines the priority of the government's tax claim in the Chapter X proceeding and Sections 216(7) and 221 establish a standard of

payment of such claim under the plan of reorganization.

The purpose of Section 199 is to insure the United States payment of all valid tax claims and claims for customs duties allowed by the District Court in a Chapter X proceeding whether the debtor is solvent or insolvent in the bankruptcy sense. This purpose is not inconsistent with the purpose of Revised Statutes Section 3466.

The Respondent-Trustee has never challenged the right of the United States to have its claim ranked as a priority claim and the right to have its claim paid as allowed in the proceeding. Such is the full "bundle of rights" accorded the Sovereign under the doctrine of *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939) and *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510 (1940).

Since the plan provides for satisfaction of the foregoing "rights" of the United States, the rejection of the plan by the Secretary of the Treasury cannot block confirmation since there is no statutory directive to this effect.

Under the facts of this case, it is within the broad discretion afforded the court under Section 216(7) and 221(2) to treat the class of the United States' claim as any other class of non-assenting creditor and examine the terms of the plan to determine if adequate protection assuring satisfaction of all the United States' rights is provided therein. The District Court and the Court of Appeals found that the plan protected the United States' claim under Section 216(7). A fund is set aside for payment to the United States and no other creditor receives a share of that fund prior to the United States. The continued existence of the fund is assured by a chattel mortgage on property of the debtor valued in excess of the balance of the government's claim.

Neither the demand of the United States for exemption from application of 216(7), nor its demand for immediate cash payment is supported by any provision of the Bankruptcy Act.

Rather, traditionally, installment and postponed payments to creditors have long been accepted as proper to facilitate reorganizations.

The alternative demand by the United States for interest on postponed payments in a debtor relief proceeding is clearly prohibited by the strong public policy against payment of post petition interest on claims of taxing authorities. *City of New York v. Saper,* 336 U. S. 328 (1948).

The United States has no legitimate complaint that the provision in the plan for a payment to unsecured creditors of a 20% dividend dilutes its rights, or that junior creditors are receiving something of value at the expense of senior creditors, for two reasons:

(1) The 20% dividend to unsecured creditors is a compromise of their claims under the plan, since these creditors would receive larger percentages if the estate were liquidated in straight bankruptcy. The District Court is given broad discretion in approving such a compromise and payment throughout the Chapter X proceeding. *Case v. Los Angeles Lumber Products, Co., supra.*

(2) Payment to other creditors is not being made from the fund set aside for the United States, hence, it does not dilute the government's share.

The facts in this case clearly establish that the District Court did not abuse its discretion in confirming the plan, nor did the Court of Appeals err in affirming the order of the District Court. The plan is "fair, equitable and feasible" in all respects.

ARGUMENT

THE PRIORITY STATUS OF THE UNITED STATES GRANTED BY SECTION 199 IS NOT INCONSISTENT WITH NOR DOES IT EXCLUDE THE APPLICATION OF THE PROVISIONS OF SECTION 216(7).

Section 199 (11 U.S.C., Sec. 599) of the Bankruptcy Act provides that the Secretary of the Treasury may accept or reject a plan of reorganization. It further provides that no plan of reorganization shall be confirmed which does not provide for the payment of all claims of the United States except upon the acceptance by the Secretary of the Treasury of a lesser sum.[3]

---

[3] Sec. 199 of the Bankruptcy Act provides as follows:

"SEC. 199. If the United States is a secured or unsecured creditor or stockholder of a debtor, the claims or stock thereof shall be deemed to be affected by a plan under this chapter, and the Secretary of the Treasury is hereby authorized to accept or reject a plan in respect of the claims or stock of the United States. If, in any proceeding under this chapter, the United States is a secured or unsecured creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against the debtor, as secured or unsecured creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance of a lesser amount by the Secretary of the Treasury certified to the court; *Provided*, That if the Secretary of the Treasury shall fail to accept or reject a plan for more than ninety days after receipt of written notice so to do from the court to which the plan has been proposed, accompanied by a certified copy of the plan, his consent shall be conclusively presumed."

Revised Statutes Sec. 3466, 31 U.S.C. Sec. 191, provides for the priority status of all debts due the United States by an insolvent debtor.[4]

The Petitioner, United States, goes to great length in its argument to review the historical background of the right of the United States to priority. (Petitioner's Brief, pp. 8-25), and to state in its brief:

> ". . . that the United States is entitled to payment first if it insists upon it." (Petitioner's Brief, p. 13).

The trustee has never contended that the United States does not have priority, nor did the courts below. It is the assertion of the Petitioner that §3466 overrides the clear intention of Secs. 199, 216 and 221 of the Bankruptcy Act with which Respondent trustee takes issue.

It is best clearly stated by the Court of Appeals in the decision rendered below.

> "Within Chapter X, §§ 199, 216 and 221 are interrelated statutes and part of a studied statutory plan. Section 199 outlines the nature of the government's tax claim "priority", and two other sections establish an equitable standard to govern the method of payment. If, as the government would have us hold, § 3466 creates an absolute right to first payment in addition to full payment, there would be little need for §§ 199, 216(7) and 221. These sections apply specifically to Chapter X proceedings and should control

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[4] R.S. §3466: "Whenever any person indebted to the United States, is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

over the more general and conflicting direction of § 3466." (R. 79).

United States v. Anderson, 334 F.2d 111, 116 (CA-5, 1964), *cert. denied*, 379 U.S. 879 (1964), succinctly states what the trustee views as the relationship between Section 199 and R.S. § 3466:

> "Nor do we think that section 199 (quoted supra in n.5) is inconsistent with R.S. § 3466. Section 199 is applicable in the reorganization of solvent as well as insolvent corporations. It requires the consent of the Secretary of the Treasury to the confirmation of any plan of reorganization which does not provide for the payment of claims of the United States for taxes. This provision first appeared in the Act of August 29, 1935, 49 Stat. 965, 966, which amended former Section 77B of the Bankruptcy Act to give a first priority to tax claims of the United States. Its legislative history shows that its purpose was to insure full payment of taxes and customs claims in every reorganization proceeding, including those involving solvent corporations where R.S. § 3466 would not apply. See Senate Report No. 1386, 74 Cong., 1st sess." *United States v. Anderson*, 334 F.2d 111, 116 (CA-5, 1964)

The trustee concedes that no plan can be confirmed without acceptance by the Secretary of the Treasury if payment of a lesser amount due the United States is called for. This does not apply in the instant case. The plan of reorganization provides for payment of the entire claim due the United States.

The trustee concedes that as a claimant the United States must be classified in one or more separate classifications in any plan of reorganization by reason of the fact that Section 199 provides that if the United States is a creditor it shall be deemed affected and thus provisions for the acceptance by the Secretary of the Treasury are included.

The United States, however, insists that Section 199 places in the hands of the Secretary of the Treasury the power to veto any plan. Under the plain and usual language of the statute, the second proviso of Section 199; i.e., the Secretary of the Treasury may veto the plan, applies *if and only if* the first proviso providing for payment is not met.

The meaning of Section 199 is clear that if the government receives payment under the plan it has no right to block confirmation of the plan. To read the statute as providing the government with a right to payment and a right to veto the plan is to reach an absurd result. No creditor can expect more than full payment under a plan; once he is so provided, he has no standing to veto the plan. The alternative as hereto alluded is to give the government the ability of throwing corporations deliberately into bankruptcy at will through § 236 of the Act should the plan not please the Secretary of the Treasury's office, regardless if it provides payment or not and on whatever terms. The objective of this proceeding to reorganize a corporation is not that the major part of the assets go to one or two tax creditors and that the remaining creditors get nothing or very little.

In these instances the over-all public interest, i.e., interests of other creditors, can only be interpreted as being endangered by the pressure of the Sovereign for an unwarranted share of the available assets. The same danger to the public good is presented by the government's position in the case at bar.

> "Whether or not the business could be forced into liquidation, rather than reorganized, is thus a matter of complete indifference to the government. . . ." (Petitioner's brief p. 38).

Such a stand can only be termed one made in total disregard for the legislative history of Chapter X and its forerunner §77B and the statutory purpose of this amendment to the Bankruptcy Act. As documented in the Petitioner's brief on pages eight through eleven, R. S. §3466 has stood for since 1797 to assure the United States its share of the estate on liquidation of the assets of an insolvent person. R. S. § 3466 has been held to apply to all indebtedness due the United States by an insolvent debtor unless inconsistent with another federal statute also applicable to the interest of the United States. *United States v. Emory,* 314 U. S. 423, 433 (1941).

The purpose of R. S. § 3466 is to assure payment to the United States from estates of insolvent debtors. The purpose of Chapter X, as has long been recognized by this Court, is not to liquidate an insolvent debtor but rather to rehabilitate a corporate debtor in failing circumstances into a solvent entity. See, *Fidelity Assurance Assoc. v. Sims,* 318 U.S. 608, 617-622 (1943); 6 Collier, *Bankruptcy* para. 0.11, 116-119 (rev.ed. 1969); H.R. Rep. No. 194, 73d Cong. 1st Sess. 1-4 (1933).

The Respondent has no quarrel with the facts set forth in the "legislative history" portion of the Petitioner's brief (pp. 8-28) only with the opinions interjected therein and the conclusions drawn therefrom. The Petitioner correctly relates that the case law of federal equity receivership proceedings, which performed the function of enabling corporations to be reorganized prior to the §77B amendment, recognized priority to be given claims of the United States under R. S. § 3466 prior to unsecured creditors but behind costs of administration, wage claims and lien creditors. Blair, *The Priority of the United States in Equity Receiverships,* 39 Harv. L. Rev. 1 (1925).

Moreover, the Congress of the United States had no intention of destroying the priority of the United States' claims for taxes or customs duties and amended the act in 1935 to so specifically provide. 79 Cong. Rec., pt. 13, 14101, 14658 (August, 1935).

Contrary to the Petitioner's interpretation of history however, Chapter X was not the child of the equity receivership proceeding but rather a cure for its ills. *Duparquet Huot & Moneuse Co. v. Evans,* 297 U. S. 216, 218-219 (1936).

It was the intention of the legislature in propounding the corporate reorganization emergency legislature to alleviate as much as possible one of the major defects in the equity receivership proceeding—among others—the inability to deal with dissenting creditors. Under the equity receivership proceeding dissenting creditors had to be paid a *pro rata* portion of the debtor's assets. This payment had to be made by the new corporation and accomplished a drain on operating capital. See, Finletter, *The Law of Bankruptcy Reorganization,* 17-19 1939); 6 Collier, *Bankruptcy,* para. O.05, 61-68 (rev.ed. 1969). In a bankruptcy proceeding the dissenting creditors and stockholders could be bound by the terms of the plan regardless of their rights under the "obligation of contracts" and "due process" clauses of the Constitution. *Canada So. R. R. Co. v. Gebhard,* 109 U. S. 527, 537-538 (1883); *Campbell v. Alleghany Corp.* 75 F. 2d 947, 952-955 (CA-4, 1935), *cert. denied,* 296 U. S. 581 (1935). The policy of scaling down claims and binding dissenting minority creditors of all classes was reported to both houses by the Committees on the Judiciary in H. R. Rep. No. 194, *supra* at p. 3 and S. Rep. No. 482, 73rd Cong., 2d Sess. 5 (1934), to-wit:

> "The plan of reorganization shall include provisions modifying or altering the *rights of creditors generally or any class of them*, secured or unsecured, through the issuance of new securities of any character or otherwise. It may include provisions modifying or altering the rights of stockholders generally or any class of them, through the issuance of new securities of any character or otherwise." (emphasis, added).

The Act as drafted and passed gave effect to the desires of the Committees on the Judiciary to deal with dissenting creditors through 77B (e) (1) which provided for the necessity of approval of a plan by only two-thirds of the class and §77B (b) (5) which provided for treatment of dissenting classes in the same terms as present §§179 and 216(7). There was no provision in §77B which prevented the application of §77B (b) (5) to the United States it it should reject a plan. Nor, is there any provision in Chapter X which excludes the United States from the application of §216 (7).

The United States contends throughout its brief that priority means payment in cash at the time of confirmation or in the alternative, interest on the deferred installments. The trustee's position is that neither of these provisions is necessary to satisfy "payment" under Section 199 if adequate protection for the realization of the value of the claim of the United States against the property dealt with by the plan has been provided pursuant to Section 216(7), 11 U.S.C., Sec. 616(7). *Nowhere in its brief has Petitioner faced up to Section 216(7) of the Bankruptcy Act, which provides as follows:*

> "SEC. 216. A plan of reorganization under this chapter—
>
> • • •

> "(7) shall provide for any class of creditors which is affected by and does not accept the plan by the two-thirds majority in amount required under this chapter, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims, either as provided in the plan or in the order confirming the plan, (a) by the transfer or sale, or by the retention by the debtor, of such property subject to such claims; or (b) by a sale of such property free of such claims, at not less than a fair upset price, and the transfer of such claims to the proceeds of such sale; or (c) by appraisal and payment in cash of the value of such claims; or (d) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection;"

Thus, the basic problem is whether or not a conflict exists between Sections 199 and 216(7). The United States refuses to face this issue squarely and head-on. Inferentially, however, the point is raised by the United States, in asserting that by priority it is meant that all claims of the United States must be paid in cash before any other creditors receive any distribution.

The trustee is of the view that payment is equivalent to satisfaction which is consistent with the provisions for providing adequate protection for dissenting creditors pursuant to one or more of the means set forth in Section 216(7).

The United States Cannot Demand Cash Payment On Confirmation of the Plan

Chapter X is silent on the method of payment to be accorded creditors, but it appears from a reading of the statute as a whole and a review of the case law that no creditor, secured or unsecured, including the United States,

can demand cash payment on the date of confirmation or any other date, should the court approve a plan providing payment by another method.[5]

As a practical matter plans are often based on payment of creditors through cash flow from the debtor's rehabilitated business itself. Accumulation of sufficient income to satisfy claims often takes a period of time after confirmation of the plan. This period is determined by the plan, not by the creditors' demands. See, *In re Gibson Hotels,* 24 F. Supp. 859, 865 (S.D. W. Va., 1938); See also, Bernhardt, *Government Priority for Repayment of Monies Advanced To Contractors,* 20 J. Nat'l. Assn. of Ref., 35, 41 (1946).

Chapter X is silent in regard to the payment method of all claimants, including the tax claimant, thereby indicating that payment may be made by any method which is considered by the court to be "fair and equitable and feasible," under Section 221(2), 11 U.S.C., Sec. 621(2), of the Bankruptcy Act. Other chapters of the Act provide specifically that the government shall be paid in cash. In an ordinary bankruptcy proceeding under Section 64(a)(4), 11 U.S.C. Sec. 104(a)(4), it is specifically provided that the United States' claim for taxes shall have priority in advance of payment of dividends. Section 65(b), 11 U.S.C., Sec. 105(b), provides for payment of dividends only if the money in the estate is in excess of the amount necessary to pay priority debts. This can only contemplate cash after liquidation of the estate. Section 337(2) of Chapter XI, 11 U.S.C., Sec. 737(2), provides that the

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[5] 6A Collier, *Bankruptcy,* para. 10.05, 431 (rev. ed. 1969) postulates that the court may even provide for payment of costs of administration in part in securities. See also, *In re Parker Young Co.,* 15 F. Supp. 965, 971 (D.C. N.H., 1936).

debtor shall deposit sufficient funds to pay priority creditors before he can proceed with any plan of arrangement. Section 64 of the Bankruptcy Act is held applicable to Section 337(2) as explained in 8 Collier, *Bankruptcy,* para. 5.33, 703-704, as follows:

> "The debts given priority by clause (4) of §64a consist of nondischargeable taxes legally due and owing by the debtor to the United States or any state or any subdivision thereof. All the provisions of §64a (4) are applicable to Chapter XI proceedings, and the taxes therein specified therefore have priority in Chapter XI cases, and the debtor must deposit the money necessary to pay those taxes. The taxes which come within the priority conferred by §64a(4) are completely discussed in Volume 3, and that discussion is applicable to Chapter XI proceedings."

In contrast, Section 102, 11 U.S.C., Sec. 502, specifically provides that Section 64 shall not apply in Chapter X proceedings.

The government's right to payment in cash was touched on in the opinion of the District Court for the Southern District of New York in *In re Huyler's,* 107 F. Supp. 318 (1952), *aff'd. sub. nom., State of New York v. Feinberg,* 204 F. 2d 502 (CA-2, 1953). In that case the New York court approved a plan of reorganization involving an insolvent corporation under which the United States and other tax claimants received in satisfaction of their claims, subordinated debenture bonds bearing interest at 6%. The District of Columbia objected to the payment of its claim in the form of debentures and asserted its right to payment in cash. The court noted that the District of Columbia had no such right to cash payment, and in so holding said that the District of Columbia could assert no greater rights

than those of the United States, which were paid in like manner.

> "The Collector of Taxes for the District of Columbia objects to the plan to the extent that it will have 'to accept other than money' as payment for taxes due it. There is no legal merit to this objection. By virtue of the August 20 amendment to the plan neither this nor any other taxing authority will have to accept anything other than money as payment for the taxes due. The new form of subordinated debenture is in essence a method of postponing the full payment in money due, and during the period of postponement interest would be payable at the rate of 6 per cent. The distraint powers of all taxing authorities may be used in the event of a default under the subordinated debentures. The implicit assumption of this objection is that Congress, which enacted the District of Columbia Revenue Act, D.C. Code 1951, §47-101 et seq., intended a departure with respect to District of Columbia taxes from the policy which the Congress has embodied in the Bankruptcy Act. The assumption that the District of Columbia taxes are entitled to special treatment not accorded to taxes owing to the United States Treasury is completely unwarranted. In this connection it is interesting to note that the Treasury has filed no objection to its treatment under the plan." *In re Huyler's,* 107 F. Supp. 318, 323 (S.D. N.Y., 1952).

It should also be noted in this regard that bondholders asserted their rights to cash in *In re Radio Keith-Orpheum Corp.,* 106 F.2d 22 (CA-2, 1939), *cert. denied,* 308 U.S. 622 (1940), and the court held that the plan was not unfair as to these creditors because it did not provide for payment in cash.

Installment payments and postponed payments have long been accepted as a portion of workable plans to facilitate reorganizations prior to the existence of Chapter X or

even its forerunner, Section 77B. *In re Reiman*, 20 Fed. Cas. No. 11,673 (S.D. N.Y., 1874) *aff'd.*, 20 Fed. Cas. No. 11,675 (S.D. N.Y., 1875); *In re Kinnane Co.*, 221 Fed. 762, 766 (S.D. Ohio, 1915). See also, Note, 51 Harv. L. Rev. 1408, 1414-1415 (1938).

In the absence of specific provisions relating to the method of payment, the United States has no right to be treated in any different fashion than other claimants. See, *City of New York v. Saper*, 336 U.S. 328 (1948). In addition, the reorganization court has the authority to hear set offs and objections to the claim and accordingly expunge or scale down the tax claim, depending upon the facts surrounding the particular case. *Lyford v. City of New York*, 137 F.2d 782 (CA-2, 1943); *In re Pittsburgh Railways Co.*, 253 F.2d 654 (CA-3, 1958); *In re* 168 *Adams Bldg. Corp.*, 105 F. 2d 704 (CA-7, 1939), *cert. denied*, 308 U.S. 623, (1940).

In summary, therefore, even under a strict interpretation of rights accorded the United States by reason of its claim to priority, these rights do not encompass the right to cash payment on the date of confirmation.[6]

The Government Has No Right to Interest On a Tax Claim From the Date of the Filing Of a Petition Under Chapter X

The Petitioner points out quite correctly, on page 27 of its brief, that the United States is not entitled to post-petition interest from the debtor's estate in a Chapter X

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[6] As a practical matter, if the plan is repudiated and the estate is liquidated under Chapters I - VII of the Act, the United States would have no statutory authority to demand payment under § 64a until such time as the trustee collected all the assets of the estate. 3A Collier, *Bankruptcy*, para. 65.02, 2285.

proceeding. *United States v. Edens,* 189 F.2d 876 (CA-2, 1951), *aff'd per curiam,* 342 U.S. 912 (1952).

What the United States neglects to point out is the strong public policy in existence behind the rule disallowing the United States interest on its tax claim in a bankruptcy proceeding, be it straight bankruptcy, Chapter X or Chapter XI. *City of New York v. Saper,* 336 U.S. 328 (1948); *United States v. General Engr. & Mfg. Co.,* 188 F.2d 80 (CA-8, 1951), *aff'd per curiam,* 342 U.S. 912 (1952).

The leading case laying down the rule in this regard as it originally applied to straight bankruptcy cases is the opinion of the court by Justice Jackson in *City of New York v. Saper,* supra, in which the *ratio decedendi* is stated as follows:

> "More than forty years ago Mr. Justice Holmes wrote for this court that the rule stopping interest at bankruptcy had then been followed for more than a century and a half. He said the rule was not a matter of legislative command or statutory construction but, rather, a fundamental principle of the English bankruptcy system which we copied. Sexton v. Dreyfus, 219 US 339, 344, 55 L ed 244, 245, 31 S Ct 256, 25 Am Bankr 363. Our present statute contains no provision expressly repudiating that principle or allowing an exception in favor of tax claims. Every logical implication from relevant provisions is to the contrary. Section 63(a) (1), 11 USCA §103(a) (5), 3 FCA title 11, §103(a) (5) allows interest only to that date on debts reduced to judgment after bankruptcy. No provision permits post-bankruptcy interest on other claims in general or tax claims in particular. Section 57(j), 11 USCA §93(j), 3 FAC title 11, §93(j) forbidding allowance of governmental penalties or forfeitures, permits allowance of losses sustained by the acts penalized, with actual costs and 'such interest

as may have accrued thereon according to law.' However, on its face this appears to delimit even such allowable debts as of the date of bankruptcy and to allow no more interest than does §63 with respect to the claims there specified.

Moreover, there is no interest except that which accrues according to law—it is exactly such interest that the 'fundamental principle' cuts off as of bankruptcy. Section 57(n), 11 USCA §93(n), 3 FCA title 11, §93(n), requires governmental claims to be proved in the same manner and within the same time as other debts and only for cause shown may a reasonable extention be granted. Tax claims are treated the same as other debts except for the fourth priority of payments, §64(a), 11 USCA 104(a), 3 FCA title 11, §104 (a), and the provision making taxes nondischargeable, §17, 11 USCA §35, 3 FCA title 11, §35. But each of these sections is silent as to interest.

The long-standing rule against post-bankruptcy interest thus appears implicit in our current Bankruptcy Act. To read into such a statute an exception to that rule would be unwarranted and, as an original proposition, we should decline to do so." *City of New York v. Saper*, 336 U.S. 328, 330-332 (1948).

In extending the rule to Chapter X in the case of *United States v. Edens, supra,* the Second Circuit Court of Appeals pointed out that the United States should not be permitted interest on its tax claims, since this would be a harsh penalty to be borne by other creditors and an undue benefit to the United States just because the proceeding is so long and protracted.

"The equitable considerations which justify denying post bankruptcy interest on tax claims in the case of reorganization proceedings are quite as strong as for denying it in straight bankruptcy proceedings. The real reason in either case is that the delay resulting from the institution of the proceeding should

> not be permitted to benefit one class of creditors at the expense of another, but that the rights of all should be determined as of the commencement of the proceeding. It is easy to see that post bankruptcy interest on tax claims in ordinary bankruptcy comes out of assets to which other creditors would be entitled." *United States v. Edens*, 189 F.2d 876, 877 (CA-2, 1951), *aff'd per curiam*, 342 U.S. 912 (1952).

Never was the reasoning in a case so pointedly applicable to another case as the reasoning in the *Edens* case, *supra*, is to the case at bar. If the United States were permitted interest on its claim from the date of confirmation to the date of full payment, the unsecured creditors would receive nothing. They, like the creditors in the *Edens* case, had no control over the period over which the administration of the estate runs; therefore, they should not be penalized by reason of a long, protracted court proceeding. No countenance will be given such a penalty by a court of equity.

It should be understood that interest on all of the claims of the United States has been computed and allowed to March 3, 1962, the date viewed as the commencement of the proceedings. See, *Clinton Trust Co. v. John H. Elliott Leather Co.*, 132 F. 2d 299 (CA-2, 1942).

The general principle applying to post-petition interest is well stated by Judge Kaufman of the Southern District of New York in *In re Huyler's* 107 F. Supp. 318, 324 (1952).

> "The face amount of the claims of the taxing authorities includes interest only to the day of the filing of the reorganization petition *and not for the period in which the bankruptcy is proceeding* and the established practice will be followed here." (emphasis added).

The rule disallowing the United States post-petition interest bars this interest through the proceeding, which would include the period between confirmation of the plan and consummation of the plan. This period is but a step in the administration of the debtor's estate. See, 6A Collier, *Bankruptcy,* para. 11.13, 666-667.

Public policy is so strong against permitting the United States to collect post-bankruptcy interest, directly or indirectly, that the bankruptcy court has been called on more than once since 1956 to correct the efforts of the United States to collect postbankruptcy interest on its claim after completion of the proceedings. Various ingenious methods have been conceived by District Directors in an attempt to recover that interest, but all have been thwarted by the bankruptcy court. See, *National Foundry Co. of New York v. Dir. of Int. Rev.,* 229 F. 2d 149 (CA-5, 1956).

In setting forth this rule disallowing post-petition interest, to which there are no exceptions it would appear the Supreme Court in the *Saper* case, *supra,* the *Edens* case, *supra,* and the *United States v. General Engrs. & Mfg. Co.* case, *supra,* was attempting to protect junior creditors in bankruptcy proceedings from receiving less than they would otherwise receive if interest on the United States' normally enormous claims was permitted. It is submitted that sometimes, in insolvency situations, the United States may be permitted to receive interest on its claim. The interest thus provided is by agreement between the parties or for the reason that some other class of creditor is afforded interest under the plan. No class of creditors is given interest under the plan at bar.

THE PRIORITY RIGHTS OF THE UNITED STATES ARE AFFORDED "FAIR AND EQUITABLE TREATMENT" UNDER THE SO-CALLED ABSOLUTE PRIORITY RULE

The rights of the United States to payment under the plan are afforded due protection under the absolute priority rule as incorporated in Chapter X through the "fair and equitable" provisions of Sections 216(7) and 221(2). The United States argues that the plan as promulgated does not satisfy the absolute priority rule.

The Petitioner's presentation on the so-called absolute priority rule most vividly points out the gross inconsistency running through the government's case. On the one hand the United States takes the position that one standard of priorities should apply to plans of reorganization of "solvent" debtors (§199) and a second to insolvent debtors (R. S. §3466). On the other hand the Petitioner's position is that portions of Respondent's plan violate the absolute priority rule which traditionally deals with interest of creditors vs. stockholders and creditor vs. creditor in the new reorganized corporation whose assets are to be valued on the basis of a "going concern."[7]

In this regard the Petitioner argues pertinaciously:

> "Each class of claims must be satisfied in full for the rights surrendered, in descending order, before the next junior class may properly be paid in the distribution. If junior creditors receive something of value at the expense of the senior creditors, the plan is not fair and equitable but 'comes within judicial denunciation'." (Petitioner's brief, p. 29).

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[7] See, Gilchrist, *Fair and Equitable Plan of Reorganization: A Clearer Concept*, 26 Cornell L Q. 592 (1941) *Cf. Northern Pacific Railway Company v. Boyd*, 228 U.S. 482 (1913); *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 130 (1939) *rehearing denied* 308 U.S. 637 (1939)

> "The present plan calls for such denunciation since it provides junior creditors with immediate, partial payment of their claims at the cost of requiring the government to accept delayed (and therefore discounted) payment of its claims and to bear the risk that the installment purchase contract will fail." (*id.* p. 36)

> "By requiring the government to accept installment payments, without interest, over a period of 78 months, the court has allotted it substantially less value than it would receive if it shared in the down-payment funds to the extent its priority suggests, or even equally with the other creditors. As senior creditor, it cannot be required to forego part of its rights, the right to be paid out of the first available funds, at least without receiving equivalent compensation in return." (*id.* p. 37).

The trustee agrees that the United States has a right to payment of the face amount of its claim in full. In order to violate the absolute priority rule, the Petitioner must be found to have surrendered this right under the plan without compensation for the right so surrendered. *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939); *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510 (1940); *Marine Harbor Properties, Inc. v. Manufacturers Trust Co.*, 317 U.S. 78 (1942). The plan at bar preserves the right of the Petitioner to receive payment in full and requires it to surrender no right it is legally entitled to.

> "Under the absolute priority rule, a plan is not 'fair and equitable' unless it provides participation for claims and interests in complete recognition of their strict priorities, and unless the value of the debtor's assets supports the extent of the participation afforded each class of claims or interests included in the plan. Any arrangement by which a junior class receives values allocable to a senior class 'comes within judicial denunciation.' Beginning with the topmost class

> of claims against the debtor, each class in descending rank must receive full and complete compensation for the rights surrendered before the next class below may properly participate. Thus the principle is applied as between senior or junior secured creditors, between secured creditors and unsecured creditors, between unsecured creditors and stockholders, between different classes of stockholders, and, of course, between secured creditors as a whole and stockholders." 6A Collier, *Bankruptcy,* para. 11.06, 613-617.

There is no provision in Chapter X which provides that the Petitioner must receive first proceeds coming into the estate. In fact, there are no provisions in any part of the Act that so provide, whether the proceedings be straight bankruptcy or Chapter XI, provided a fund is set aside to pay priority claims. See, Section 64, Section 337(2), Bankruptcy Act, 11 U.S.C., Sec. 104; 11 U.S.C., Sec. 737(2).

In the case at bar a fund has been set aside to pay the priority claims; as the estate receives payment, the United States receives payment. There is no other creditor being paid out of that portion of the fund designated to go to the United States before it is paid.

The United States contends that the payment to unsecured creditors is at the expense of a senior class, i.e., the United States—the contrary is true. It is the junior class which is giving up rights.

The plan is actually a plan of liquidation. It is not different in effect than the plan considered in *In re Capitol Foundry Corp.,* 83 F. Supp. 413 (E.D. N. Y., 1949), wherein the court determined the plan to be fair, equitable and feasible, which did not provide for interest on the claims of the United States even though general creditors received cash dividends under the plan.

The modified contract of sale indicates that the original $1 Million to be paid by Hennis to the debtor for its operating rights has now been set at $935,000, to be paid over a six and one-half year period.

If the funds were collected by the trustee and distributed in order of bankruptcy priority (assuming an adjudication under §236 and application of Section 64), and if distribution were ordered as funds received, the United States and other tax claimants would not receive their full principal amounts until four and one-half years later.[8]

The general unsecured creditors would thereafter receive a dividend of approximately 26-32%, dependent upon

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[8] The calculation is based on cash in the hands of the trustee of $75,000; payments made by Hennis under the contract to purchase operating rights of $300,000 within 90 days and the balance of $635,000 in 78 monthly installments; and costs of administration of $90,000 maximum:

Total funds in the estate:		
Procured from sale of operating rights		$ 935,000
Cash in hands of trustee		75,000
Total		$1,010,000
First distribution — 90 days:		
(a) Funds available		
Received from Hennis within 90 days		$ 300,000
Funds in hands of trustee		75,000
		$ 375,000
Less administrative expenses		(90,000)
Available for distribution:		$ 285,000
(b) Priority claims		
64(a)(1) Wages		$ 14,872.44
64(a)(5) Taxes		682,063.14
		696,935.58
(c) Remaining Tax claims after 1st distr.		$ 411,935
(d) Monthly payments from Hennis	$8,141.00	
Accumulated after 6 months —	48,846.00	
Second distribution—6 months after bankruptcy		48,846.00
		$ 363,089.00
Subsequent distributions—6 month intervals of $48,846 each (total of 8)		390,768.00
Balance accrued for general creditors		$ 27,679.00

the final costs of administration. Thus, the general creditors have agreed to scale down their equity from 26-32% to 20%.[9]

Nothing has been taken from the United States. It receives at the same time as the unsecured creditors receive their dividends the full value of its claim in the form of an assignment of note executed by the purchaser of the operating rights and secured by a chattel mortgage on property whose value is far in excess of its claim with provisions for payment in a manner consistent with which it would be paid in liquidation in straight bankruptcy.

Moreover, it is within the power of the trustee to compromise and pay claims during the proceedings or in the plan of reorganization. In *Case v. Los Angeles Lumber Products Co., supra,* the Supreme Court pointed out that compromise and settlement of claims is not only an allowable procedure in reorganization cases, but is often a sensible and desirable course to pursue. A compromise may be effected separately during the proceedings or in the body of the reorganization plan itself. *In re Paramount Publix Corp.,* 7 F. Supp. 988 (S.D. N.Y., 1934); *In re Kalamazoo Bldg. Co.,* 21 F. Supp. 852 (W.D. Mich., 1937); *In re Chicago Rapid Transit,* 196 F. 2d 484 (CA-7,

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[9] Assuming administration expenses of $90,000 after payment of priority creditors explained in fn 8, *supra,* $223,065 would remain for payment to general creditors whose claims total $842,640.75. A dividend of 26% would therefore be paid.

Total assets in the estate	$1,010,000.00
Less costs of administration	(90,000.00)
	$ 920,000.00
Less total priority claims	696,935.00
Available for general creditors	$ 223,065.00

As the costs of administration are decreased, the dividend to general creditors increases proportionately. If costs of administration are $40,000, the dividend would be 32%. The general creditors would have to wait 6½ years for full payment of their dividends.

1952); *In re Associated Gas & Elec. Co.*, 149 F. 2d 996 (CA-2, 1945), *cert. denied*, 326 U.S. 736 (1945). The agreement in the plan to pay general unsecured creditors 20% of their claims in a compromise with that class, since as pointed out above, if the estate were liquidated, in all probability these creditors would receive 26-32% of their claims. The trustee had the power to effect a settlement of these claims at any point in the proceedings prior to submission of the plan, or in the plan itself. Such compromise, if found in the best interests of the estate, must be approved by the District Court. Approval involves the exercise of judicial discretion and will not be disturbed on appeal except for abuse.

In attacking the plan by asserting that it violates the absolute priority rule, the United States omits to explain fully that such rule is one of equity administered by a court of equity. See generally, *Bank of Marin v. England* 385 U.S. 99 (1966).

The rule is a flexible one for two reasons: (1) the reorganization court has a duty to protect all creditors regardless of priority, *In re Atlas Pipeline Corp.*, 39 F. Supp. 846 (W.D. La., 1941); and (2) its application depends on the facts of the case, *Consolidated Rock Products v. Du Bois:*

> "Practical adjustments, rather than a rigid formula, are necessary. The method of effecting full compensation for senior claimants will vary from case to case." *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510, 529 (1940).

Collier defines the flexibility which the principle has gained through application as follows:

> "But even this 'fixed principle,' like other matters of classification, is subject to the doctrine that the re-

> organization court, acting as a court of equity and to prevent injustice, unjust enrichment or the like, may subordinate or postpone or separately classify for different treatment particular claims of a certain group, or subordinate a certain class or classes that would not otherwise be prior, on the basis of equitable considerations invoked by the facts present." 6A Collier, *Bankruptcy,* para. 9.10, 214-215.
>
> See also; *In re Peyton Realty Co.,* 18 F. Supp. 822 (E.D. Pa., 1936); *Downtown Inv. Ass'n v. Boston Metro Bldg.,* 81 F.2d 314, 323 (CA-1, 1936); *In re Central Forging Co.,* 38 F. Supp. 18 (M.D. Pa., 1941).

Almost without exception the cases dealing with legitimate complaint of violations of the absolute priority rule under Chapter X involve situations where secured creditors who have rights by contract find these rights flagrantly violated in that interest rates on bonds and notes are reduced under the plan, and the terms for maturity of these obligations are extended, while junior creditors and stockholders receive some compensation which properly belongs to the senior creditor by contract. In addition to the cases cited by the United States, which involve bondholders under Chapter X, a bondholder under the railroad reorganization provision of the Bankruptcy Act, and a stockholder under Chapter X, to-wit: *Consolidated Rock Products Co. v. Du Bois, supra; Group of Institutional Investors v. Milwaukee Railroad Co.,* 318 U.S. 523 (1943); *Petition of Portland Electric Power Co.,* 162 F. 2d 618 (CA-9, 1947), *cert. denied,* 332 U.S. 837 (1947), The following examples of flagrant violations of the rule are given:

> Where a group of nonassenting bondholders were afforded a reduction of interest paid on their bonds under the plan and extension of the maturity date of the bond, coupled with reduction of the principal amount of the bonded indebtedness of some $26,000.

Francisco Bldg. Corp. v. Batson, 83 F.2d 93 (CA-9, 1936).

Where the class of non-assenting bondholders were asked to give up interest under the bond and assent to a seven-year extension of the maturity of said bonded indebtedness. *In re Lorrain Castle Apartments Bldg. Corp.,* 149 F.2d 55 (CA-7, 1945), *cert. denied,* 326 U.S. 728 (1945).

Where a plan of reorganization provided that first mortgage bonds be reduced by one-half of their principal amount and that equity thereby created be represented by issuance of new preferred and common stock to be shared by general creditors and present shareholders coupled with a provision for elimination of past-due interest on the bonds. *Day, Meyer, Murray and Young,* 93 F.2d 657 (CA-2, 1938).

See also, *In re Wilton Realty Corp.,* 30 F. Supp. 486 (E.D. Mich., 1938), *aff'd per curiam,* 106 F.2d 1022 (CA-6, 1938), *cert. denied, sub. nom., Wilton Realty Corp. v. Weadock,* 308 U.S. 626 (1940).

It is illustrated from the above-cited cases that the plans which have met destruction on the rock of the absolute priority clause have, without exception, involved a decrease in the payment which the senior creditor involved had a right to by reason of his contract with the debtor.

The United States asserts that the failure to pay the government its full claim in a shorter period does not result from a shortage of funds and that accordingly it is entitled to receive equivalent compensation in the form of interest for the delay imposed. (Petitioners brief, p. 27)

As heretofore indicated, funds would not be available to satisfy the claims of the government for more than four and one-half years (Fn. 8). Thus, the interest which the United States should be entitled to for equivalent com-

pensation, if at all, should amount to no more than $6,492.00.[10]

But no interest at any rate is being paid to other classes of creditors, including other tax claimants who would share an equal priority in straight bankruptcy. An analogous situation is found in *State of New York v. Feinberg,* 204 F.2d 502 (CA-2, 1953). The State of New York contended it was entitled to 9% interest on the debentures given to satisfy its claim, as the statutory rate to which it was entitled, and thus required to assure it equivalent compensation under the absolute priority rule. The Court in overruling the objections stated at p. 503:

> "... 'Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest'...."
>
> "Hence, Judge Kaufman was quite within his power in allowing the state here only such interest as other bondholders of like class were to receive."

The District Court was aware that the absolute priority rule is governed by the equities of the particular case, as set forth in part at the hearing on confirmation of the plan on December 8, 1967:

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[10] If payment were made first to the United States, at the end of 4½ years it would have received its full claim (Fn. 8, supra). Under the plan at the end of 4½ years, assuming no acceleration of payment of the Hennis note, the United States will have received 72.3% of its claim (54 installments of $4,332.00 or 1.15% each, plus the original 10% at confirmation). Thus, at the end of 4½ years, a principal balance of $103,919.90 would be owing the United States. Allowing 6% interest on future payments, allocating the monthly payments to principal and interest results in an interest load of $6,492.00.

"THE COURT: I don't want—Mr. Boyle, I don't want the impression to be gained that this is to be the rule as far as this particular court is concerned. There may be many, many cases in the future where I would not pursue this course. This case has been pending a long time, and many, many of the smaller creditors have waited a very, very long time, and I have been trying to weigh the equities, and this is an equitable proceedings even though it's governed by statute. I have been trying to weigh the equities between following the course that the Government would have the Court follow and following the course that the Court has chosen to follow, and I still believe that the factors weigh so heavily in favor of the Court confirming the Plan to get this thing closed, that the Court would not be doing what it thinks it should be if I were to go the other route." (R. 56-57).

Even under the strictest interpretation of the absolute priority rule, the plan at bar violates none of the United States' rights. It is submitted that the plan would indeed be inequitable if it were to provide interest for the United States' claim out of a fund which rightfully belongs to unsecured creditors.[11]

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[11] If the United States and the other three tax claimants in Classes 3, 4, and 5 were allowed 6% interest as demanded by the United States, this would amount to approximately $120,000. This added to the estimated total cost to Hennis exceeds the maximum amount which they are required to pay, bringing the total cash to $1,045,000.00, or in the alternative, deducting the excess from the fund allocated to the general creditors.

	Am't of Claim	Cash Distr.
Est. Administration Costs	$ 60,000.00	$ 60,000.00
Class 1, Wages	14,872.44	14,872.44
Class 2, United States	375,386.55	375,386.55
Class 3, Indiana Gross Income	31,218.91	31,218.91
Class 4, Vanderburgh County	76,650.55	76,650.55
Class 5, Ohio Highway Use Tax	184,486.39	184,486.39
Class 6, Misc. taxes	14,320.74	14,320.74

continued on p. 39

THE PLAN PROVIDES ADEQUATE PROTECTION FOR THE PAYMENT IN FULL OF THE UNITED STATES AS A NON-ASSENTING CREDITOR, THEREFORE THE PLAN CAN BE CONFIRMED OVER THE REJECTION OF THE PLAN BY THE PETITIONER AS A CLASS.

Since the plan provides payment in full of the face amount of the claim of the United States, its rejection of the plan can be treated as a rejection by any other class of creditor, giving the District Court the right to examine the plan as to adequate protection under Section 216(7). Section 216(7) of the Bankruptcy Act authorizes four alternative methods of going forward with a reorganization plan without the assent of an affected class, to-wit:

> "(7) shall provide for any class of creditors which is affected by and does not accept the plan by the two-thirds majority in amount required under this chapter, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims, either as provided in the plan or in the order confirming the plan, (a) by the transfer or sale, or by the retention by the debtor, of such property subject to such claims; or (b) by a sale of such property free of such claims, at not less than a fair upset price, and the transfer of such claims to the proceeds of such

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Footnote #11 continued:

Class 7 Personal Injury	1,119.42)		
Class 8 Cargo Loss & Damage	38,240.06)	842,640.75	168,528.15
Class 9 General	803,281.27)		
Total Cost Under Plan			925,463.73
Estimated Interest			120,000.00
Total Requird			$1,045,463.72
Maximum Cost to Hennis	$935,000.00		
Cash Available	75,000.00		
	$1,010,000.00		

sale; or (c) by appraisal and payment in cash of the value of such claims; or (d) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection;"

Here, again, Chapter X is silent as to the exclusion of the United States from the application of this provision; therefore, it can be assumed that the provision is applicable under the rule that tax claimants will be treated as other claimants unless there is specific provision excluding them. *City of New York v. Saper, supra.*

For a general review of the legislative history and court decisions diluting the priority treatment of taxing authorities in bankruptcy practice, seen generally, *In re Halo Metal Products v. Randall,* C. C. H. 1969 Stand. Fed. Tax Rep. (Cas. No. 17608) para. 9123 (CA-7, 1969).

It is the position of the trustee that the means of execution of the plan, as provided under Article VIII (R. 67-68) provides adequate security to the United States as required under the cases interpreting Section 216(7).

It is submitted that the cases interpreting this section are few, since generally if the plan is found fair and equitable by the court; creditors have assented to the plan.

Section 216(7) provides the court with statutory matter for dealing with irate or recalcitrant creditors when the court in its discretion deems the plan as satisfying the fair, equitable and feasible provisions of Chapter X. At that point in the proceeding, the court usually requests that the trustee amend the plan to provide adequate protection for the recalcitrant creditor. In the case at bar, the plan had a built-in provision which satisfied the requirements of Section 216(7).

"The adequate protection for the realization by them (the United States) of the value of their claims against the property dealt with by the plan and affected by such claims . . . "has been provided in this instance (a) by the transfer or sale of the operating rights of the debtor, its substantial asset, subject to the claims of the dissenter in the form of a chattel mortgage for the balance due and (b) by a sale of property (the operating rights) at not less than a fair upset price ($935,000.00) and a transfer to the proceeds of sale, the government receiving 10% of the immediate cash and an assignment of the moneys due.

It would appear that all of the cases involving Sections 216(7) (a) and (b) relate to specific property to which specific claims have attached, the holders of such claims being mortgagees, bondholders or mechanic's lienors.

In re Englander Spring Bed Co., 17 F. Supp. 15 (E.D. N.Y., 1936), *aff'd per curiam*, 86 F. 2d 998 (CA-2, 1936) (involving mortgagees); *In re Central Forging Co.*, 38 F. Supp. 18 (M.D. Pa., 1941) (involving bondholders); *cf. Francisco Bldg. Corp. v. Batson*, 83 F. 2d 93 (CA-9, 1936).

In this instance the claim of the United States is not secured by any specific property, it is at most a general claim against all assets. Thus, the ordinary marshaling of assets should be sufficient to protect its priority. The Court in granting equitable relief has thus set aside under the provisions of Section 216(7) (a) or (b) sufficient property or proceeds to satisfy the requirements thereof.

If this appears too novel a situation to fall within the meaning of Section 216(7) (a) or (b), then certainly this is *the* case for which Section 216(7) (d) was intended.

As stated in 6A Collier, *Bankruptcy*, para. 10.17, 490-491 (rev. ed. 1969), in speaking of Section 216(7) (d):

> "It has been said that these methods, properly speaking, are not 'methods' at all, but merely empower the judge, who must approve and confirm the plan, to approve any means of treatment which under the particular circumstances 'equitably and fairly' affords adequate protection to the dissenters. Even though this may be a proper characterization, the provisions are not to be read out of the statute because of it. Admittedly, the potentialities of paragraphs (7) (d) and (8) (c) are difficult to define, but there seems to be little reason why they should not remain effective as possible alternatives to encompass the largely unforeseen case."

We submit that the instant plan is one which fits the shoe of special circumstances described in *Texas Hotel Securities Corp. v. Waco Development Co.*, 87 F.2d 395, 400 (CA-5, 1936); *cert. denied*, 300 U. S. 679 (1937), *rehearing denied*, 301 U. S. 713 (1937), in commenting on the forerunner clause in 77B:

> "There may be other cases of special circumstances in which adequate protection for realization of value can be worked out as contemplated by subparagraph(d)."
>
> See also, *National City Bank of New York v. O'Connell*, 155 F. 2d 329 (CA-2, 1946).

In this regard it should be noted that under Section 221 of the Act the District Judge is given broad discretion in weighing the facts and circumstances, in determining if the plan "satisfies" the absolute priority rule as well as Section 216. 6A Collier, *Bankruptcy*, para. 11.02, 581-582, sets forth the rule in this regard as follows:

> "The judge of the reorganization court is empowered to confirm a plan only 'if satisfied' that the conditions stated in §221 have been complied with. The words 'if satisfied' vest a broad discretion in the judge." See generally, *In re Waern Building Corp.*, 145 F.2d 584 (CA-7, 1944), *cert. denied*, 324 U.S. 871 (1945).

The United States in its brief implies that the purchaser may not be financially strong enough to see the purchase through to its conclusion or that the value of the operating rights might deteriorate.

The United States argues, on p. 38 of its brief, as follows:

> ". . . There is the least possible basis for requiring the government to assume any risk in this case, for the debtor here is no longer operating its business."

The applicable reply to such a position is, perhaps, the overused retort, "Life itself is a risk."

The District Court was well aware of the lengthy hearings before the Interstate Commerce Commission, the hearing examiner's report of March 26, 1964, and the approval by the Interstate Commission of said report recommending the sale of the operating rights on March 11, 1965. Such approval had necessarily to concern itself with the ability of the purchaser to pay and the value of the rights. I.C.C. Docket # MC-F-8117, Finance Docket #22243.

At the hearing on approval of the plan held on September 7, 1967, and the hearing on confirmation held December 8, 1967, the District Court had before it both evidence of the ability of the buyer, Hennis, to make payments under the modified agreement of sale and the ability of the estate to meet all payments as set forth under the plan of reorganization.

The evidence before the court clearly establishes that the value of the interstate operating rights transferred by the debtor to Hennis is not less than $850,000 (R. 30-33, 34-36); that its value has increased over the years; and that the income from the sale of these operating rights will be sufficient to assure payment to the government of its claim from the fund comprised of payments made under this agreement. (R. 31-34, 36-39).

The record is sufficient to support the finding of the court that adequate protection is provided the United States for the realization of its claim from the property dealt with and to provide protection for the aforesaid dissenting claimant.

CONCLUSION

The trustee's plan is fair, equitable and feasible. The order of the District Court confirming said plan should be upheld.

Respectfully submitted.

Sigmund J. Beck,
Edward B. Hopper II,
500 Union Federal Building,
Indianapolis, Indiana 46204

Attorneys for Respondent.

Bamberger & Feibleman,

Of Counsel.

APPENDIX

Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

(31 U.S.C. 191.)

Bankruptcy Act, c. 541, 30 Stat. 544 [as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840]:

SEC. 199. If the United States is a secured or unsecured creditor or stockholder of a debtor, the claims or stock thereof shall be deemed to be affected by a plan under this chapter, and the Secretary of the Treasury is hereby authorized to accept or reject a plan in respect of the claims or stock of the United States. If, in any proceeding under this chapter, the United States is a secured or unsecured creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against the debtor, as secured or unsecured creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance of a lesser amount by the Secretary of the Treasury certified to the court: *Provided,* That if the Secretary of the Treasury shall

fail to accept or reject a plan for more than ninety days after receipt of written notice so to do from the court to which the plan has been proposed, accompanied by a certified copy of the plan, his consent shall be conclusively presumed. (11 U.S.C. 599.)

SEC. 216. A plan of reorganization under this chapter—

(1) shall include in respect to creditors generally or some class of them, secured or unsecured, and may include in respect to stockholders generally or some class of them, provisions altering or modifying their rights, either through the issuance of new securities of any character or otherwise;

(2) may deal with all or any part of the property of the debtor;

(3) shall provide for the payment of all costs and expenses of administration and other allowances which may be approved or made by the judge;

* * * * *

(5) shall specify what claims, if any, are to be paid in cash in full;

* * * * *

(7) shall provide for any class of creditors which is affected by and does not accept the plan by the two-thirds majority in amount required under this chapter, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims, either as provided in the plan or in the order confirming the plan, (a) by the transfer or sale, or by the retention by the debtor, of such property subject to such claims; or (b) by a sale of such property free of such claims, at not less than a fair upset price, and the transfer of such claims to the proceeds of such sale; or (c) by appraisal and payment in cash of the value of such claims; or (d) by such method as will, under and consistent with the circumstances of

the particular case, equitably and fairly provide such protection;

• • • • •

(11 U.S.C. 616).

SEC. 221. The judge shall confirm a plan if satisfied that—

(1) the provisions of article VII, section 199, and article X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

• • • • •

(11 U.S.C 621).

SEC. 236. If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consumated, the judge shall—

(1) where the petition was filed under section 127 of this Act, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this Act; or

(2) where the petition was filed under section 128 of this Act, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders.

(11 U.S.C. 636)

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 402.—October Term, 1969

United States, Petitioner, v. Sheldon A. Key, Trustee. } On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March 30, 1970]

Mr. Justice Marshall delivered the opinion of the Court.

In this case the United States challenges the treatment given to its claim for unpaid taxes against an insolvent corporation in reorganization under Chapter X of the Bankruptcy Act, 11 U. S. C. §§ 501–676. Under the reorganization plan approved by the District Court, the debtor, Hancock Trucking, Inc., will sell its chief asset, its Interstate Commerce Commission operating rights, to Hennis Freight Lines, Inc., for $935,000. The sale contract provides for a $300,000 down payment, with the balance to be paid in 78 monthly installments. Under the reorganization plan, the down payment will be used to satisfy certain wage and state and local tax claims in full, to satisfy 20% of the claims of the unsecured creditors, and to satisfy about 10% of the United States' tax claim of $375,386.55. The remainder of the United States' claim will be paid out of the monthly installments. The plan, an atypical one for a corporate reorganization, does not contemplate the continued existence of the debtor as a going concern, but amounts in substance to a liquidation.

The United States objects to that aspect of the plan which provides for partial or complete payment of the

claims of unsecured creditors and state and local government units before full payment of the federal tax claims. This, the Government urges, violates the command of § 3466 of the Revised Statutes, 31 U. S. C. § 191, that "[w]henever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied." Respondent urges that § 3466 does not apply to Chapter X proceedings, but that the United States is entitled only to "payment" of its tax claim, as provided by § 199 of the Bankruptcy Act, 11 U. S. C. § 599.

The Court of Appeals accepted respondent's theory, and affirmed the order of the District Court approving the plan. 407 F. 2d 635 (C. A. 7th Cir. 1969). We granted certiorari, 396 U. S. 874 (1969), and we reverse.

Since the earliest days of the Republic, § 3466 and its predecessors have given the Government priority over all other claimants in collecting debts due it from insolvent debtors.[1] The present statute has existed almost unchanged since 1797,[2] and its historical roots reach back to the similar priority of the Crown in England, an aspect of the royal prerogative, founded upon a policy of protecting the public revenues.[3] The same policy underlies the federal statute, *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 35 (1832), and it is established that the terms of § 3466 are to be liberally construed to achieve this broad purpose. *Beaston* v. *Farmers' Bank*, 12 Pet. 102, 134 (1838); *Bramwell* v. *United States Fidelity Co.*, 269 U. S. 483, 487 (1926).

Section 3466 applies literally to the situation here. The debtor is concededly insolvent, and it is established

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[1] See, *e. g.*, Act of July 31, 1789, c. 5, § 21, 1 Stat. 42; Act of August 4, 1790, c. 35, § 45, 1 Stat. 169.

[2] See Act of March 3, 1797, c. 20, § 5, 1 Stat. 515, as amended by the Act of March 2, 1799, c. 22, § 65, 1 Stat. 676.

[3] See 33 Hen. VIII, c. 39, § 74 (1541); 13 Eliz. I, c. 4 (1570).

that a tax debt is a "debt due to the United States" within the meaning of the statute. *Price* v. *United States*, 269 U. S. 492, 499 (1926). No provision of Chapter X explicitly excepts corporate debtors in reorganization from the application of § 3466, and so the only remaining question is whether the legislative scheme established in Chapter X, either by logical inconsistency or other manifestation of congressional intent, implies such an exception.

In approaching a claim of an implied exception to § 3466, we start with the principle, noted above, that the statute must be given a liberal construction consonant with the public policy underlying it. Applying that principle to an earlier claim that a statutory scheme implicitly excluded § 3466, this Court held that "[o]nly the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of § 3466." *United States* v. *Emory*, 314 U. S. 423, 433 (1941).

Here the Court of Appeals discerned an intent not to apply § 3466 to Chapter X proceedings from § 199 of the Bankruptcy Act, which forbids the approval of any reorganization plan which does not provide for the "payment" of taxes or customs due to the United States, unless the Secretary of the Treasury accepts "a lesser amount."[4] The Court of Appeals further supported its

[4] Section 199 provides:

"If the United States is a secured or unsecured creditor or stockholder of a debtor, the claims or stock thereof shall be deemed to be affected by a plan under this chapter, and the Secretary of the Treasury is authorized to accept or reject a plan in respect of the claims or stock of the United States. If, in any proceeding under this chapter, the United States is a secured or unsecured creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against the debtor, as secured or unsecured creditor or stockholder), no plan which does not provide for the payment thereof shall be con-

inference of exclusionary intent from §§ 216 (7) and 221 of the Act. Section 216 (7) provides that where a class of creditors dissents from a reorganization plan, the District Court shall provide "adequate protection for the realization by them of the value of their claims against the property" in any of four ways, the last and most general of which is by "such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection." Section 221 merely sums up the applicable tests for a valid reorganization plan by providing that "[t]he judge shall confirm a plan if satisfied that" § 199 has been complied with and that "the plan is fair and equitable, and feasible."

The Court of Appeals reasoned from these provisions to the implied exclusion of the operation of § 3466 as follows:

> "Within Chapter X, §§ 199, 216 and 221 are inter-related statutes and part of a studied statutory plan. Section 199 outlines the nature of the government's tax claim 'priority,' and two other sections establish an equitable standard to govern the method of payment. If, as the government would have us hold, § 3466 creates an absolute right to first payment in addition to full payment, there would be little need for §§ 199, 216 (7) and 221. These sections apply specifically to Chapter X proceedings and should control over the more general and conflicting direction of § 3466." 407 F. 2d, at 638.

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firmed by the judge except upon the acceptance of a lesser amount by the Secretary of the Treasury certified to the court: *Provided*, That if the Secretary of the Treasury shall fail to accept or reject a plan for more than ninety days after receipt of written notice so to do from the court to which the plan has been proposed, accompanied by a certified copy of the plan, his consent shall be conclusively presumed."

In our view these provisions are not logically inconsistent with the terms of § 3466, nor would they be rendered redundant if the older statute applied, nor does their language or legislative history reveal a purpost incongruous with its application.

In the first place, § 216 (7) has nothing to do with the priorities of different classes of claimants under Chapter X. That section merely provides that where an affected class of creditors (and here the United States itself constitutes the whole of such a class) dissents from a plan, their claims are to be dealt with in one of the four ways specified, one of which is that those claims must be disposed of "equitably and fairly."

This Court has long held that these words, along with the words "fair and equitable" in § 221, in no way authorize a District Court to ignore or erode priorities otherwise granted by law, and it follows that this language cannot be taken to exclude by implication an explicit statutory priority, such as that granted the United States by § 3466. In short, the words "fair and equitable" in Chapter X are terms of art, and no plan can be "fair and equitable" which compromises the rights of senior creditors in order to protect junior creditors. *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115–116 (1939); *Consolidated Rock Co. v. Du Bois*, 312 U. S. 510, 527–529 (1941).

We turn then to the argument upon which respondent chiefly relies for his claim that § 3466 does not reach to Chapter X proceedings—the alleged inconsistency between application of the "first satisfied" requirement and the terms and purposes of § 199. As already noted, § 199 provides that the United States shall have "payment" of its tax claims in Chapter X proceedings unless the Secretary of the Treasury accepts "a lesser amount." Respondent argues and the Court of Appeals held that this establishes by negative implication that Congress

did not mean the United States to be able to insist upon the more onerous remedy of payment first in time.[5]

As a matter of logic, we see no inconsistency between a requirement of payment and a requirement of first satisfaction. Congress surely could have provided that the United States receive payment out of a limited fund at the expense of other claimants, and quite consistently provided that when the wherewithal to make such payment became available in installments over time the United States should also have the right to claim the first of those installments and each succeeding one until its debt was satisfied.[6] Separate provisions to this effect

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[5] The Government argues in the alternative that even if § 3466 does not apply to claims against debtors in Chapter X, the plan here is defective even under the § 199 requirement of "payment" alone, since the deferment of payment of the Government's tax claim while the cash flow from the installment contract is used to satisfy the claims of lower ranking creditors means that the Government is receiving a "lesser amount, which § 199 in its terms contrasts with "payment," than what it would receive if it had first claim on all cash as it came in. The argument is premised on the fact that the Government cannot collect post-petition interest on its claim. *City of New York* v. *Saper*, 336 U. S. 328 (1949); *United States* v. *Edens*, 189 F. 2d 876 (C. A. 4th Cir. 1951), aff'd *per curiam*, 342 U. S. 912 (1952). Because of our determination that § 3466 applies here and requires payment first in time, we need not reach this contention.

[6] In the normal Chapter X reorganization no provision need be made for priority in time of different claims. Claimants receive debt or equity interests in a going concern in the usual situation, and the priority of one claimant over another means only that if there is insufficient going concern value to satisfy both claims, the claimant with priority must receive value equivalent to his full claim if the other claimant is to receive anything. Here a second sense of priority is involved: when cash becomes available to pay off outstanding claims only over a period of time, the claimant with "priority" in this second sense receives his cash first in time; the nonpriority claimant may receive full payment, but receives it later. In its literal language—"first satisfied"—§ 3466 provides this kind of priority, and respondent has not argued that it should not be so construed if it applies here.

in the same statute could certainly be read in harmony with each other, and there is no reason why § 3466 should not be read to supplement the requirement of payment contained in § 199 in the same fashion.

Nor is § 199 redundant if § 3466 applies in Chapter X proceedings on the ground that a requirement of first satisfaction necessarily implies a requirement of payment. Section 3466 applies only to insolvent debtors.[7] Yet Chapter X proceedings are not open merely to corporations which are insolvent, in that their liabilities exceed their assets, but also to those which are solvent in the bankruptcy or asset-liability sense and yet are unable to meet their obligations as they mature. Bankruptcy Act § 130 (1), 11 U. S. C. § 530 (1). Thus § 199 does not merely give the Government rights already granted by implication in § 3466, but extends the Government's priority, for tax claims at least, to solvent corporations in Chapter X reorganization.

Thus on the face of the statute, no inconsistency arises from applying both § 3466 and § 199 to Chapter X proceedings, much less the "plain inconsistency" required if respondent is to prevail under the test of *United States* v. *Emory*, *supra*. That in itself strongly suggests that § 3466 should apply here, and our examination of the background and legislative history of § 199 and of Chapter X generally does not reveal a contrary intent on the part of Congress.

Before the reorganization legislation of the 1930's, the principal method of reorganizing corporations which were unable to meet their debts was the equity receivership. This judge-made device was designed to preserve the debtor business as a going concern by cancelling claims against it, in return for which cancellation the claimants

[7] It seems to have long been assumed that the term insolvent in § 3466 meant insolvent in the bankruptcy sense, and this Court clearly so held in *United States* v. *Oklahoma*, 261 U. S. 253, 260–261 (1923).

received debt or equity interests in a new corporation, which then acquired the assets of the old corporation in a judicial sale. See T. Finletter, The Law of Bankruptcy Reorganization 1–17 (1939). By 1926, it was established that § 3466 applied to give the United States an absolute priority for payment of debts due it from insolvent corporations in equity receivership. *Price* v. *United States*, 269 U. S., at 502–503; and see Blair, The Priority of the United States in Equity Receiverships, 39 Harv. L. Rev. 1 (1925).

In 1933, Congress enacted § 77 of the Bankruptcy Act, 47 Stat. 1474, providing a statutory procedure for the reorganization of railroads. Section 77, as well as later corporate reorganization statutes discussed below, were designed to follow the general format of the equity receivership. As one of the early commentators on the federal statutes has noted, "[t]he principles of the equity receivership underlie nearly every substantive provision of the [reorganization acts]." T. Finletter, *supra*, at 3. These statutes were not, of course, mere codifications of the law governing equity receiverships. They were designed in part to correct abuses and inefficiencies which had existed under the prior regime. *Duparquet Co.* v. *Evans*, 297 U. S. 216, 218–219 (1936). However the problems of the equity receivership which led to the legislative intervention did not include the Government's priority under § 3466, a relatively uncontroversial aspect of the receivership procedure.

Nothing in § 77 cast any doubt on the continued priority of the United States under § 3466. Indeed the only provision in the new statute affecting the claims of the United States was § 77(e), which provided in pertinent part:

> "If the United States of America is directly a creditor or stockholder, the Secretary of the Treasury

> is hereby authorized to accept or reject a plan in respect of the interests or claims of the United States." 47 Stat., at 1478.

The purpose of this provision was to overcome the effect of two prior rulings of the Attorney General that the Secretary of the Treasury lacked authority to compromise claims of indebtedness owed to the Government by the railroads, 33 Op. Atty. Gen. 423 (1923), 34 Op. Atty. Gen. 108 (1924).[8]

In 1934, Congress enacted § 77B of the Bankruptcy Act, 48 Stat. 911, which provided a reorganization scheme for corporations generally, closely modeled on the railroad reorganization scheme of § 77; § 77B (e)(1) granted the Secretary of the Treasury power to compromise federal claims, in language almost identical with that of § 77 (e). 48 Stat., at 918. There is no language in the statute, and nothing in its history, to suggest any intention to alter the established priority of the United States under § 3466.

In 1935, the Secretary of the Treasury called the attention of Congress to the fact that the courts were construing § 77B (e)(1) to include the United States among the general creditors in reorganization proceedings, so that plans disapproved by the Secretary for failure to satisfy a federal claim could nevertheless be confirmed if the necessary majority of general creditors approved. S. Rep. No. 953, 74th Cong., 1st Sess. (1935). The Secretary proposed an amendment, which after some weakening in the House, see S. Rep. No. 1386, 74th Cong., 1st Sess. (1935), was adopted.[9] 49 Stat., at 966

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[8] See Senate Committee on the Judiciary, Criticisms and Suggestions Relating to H. R. 14359 and S. 551, Amending the Bankruptcy Act, at 19–20 (Comm. Print. 1933).

[9] The Secretary had proposed that he be given a veto over plans which failed to provide for "payment" of *any* federal claim. See S. Rep. No. 953, *supra*. The House imposed the "payment" require-

(1935). In its relevant provisions, the amendment was identical with present § 199, and the 1938 revisions which culminated in the replacement of § 77B by present Chapter X did not affect it.

Thus § 199 is derived from an enactment designed to grant the Government the power to compromise its claims against debtors, and an amendment designed to ensure priority for federal claims over the claims of general creditors. Nothing in this background lends any support to respondent's claim that the draftsmen of Chapter X meant to provide an exception to the operation of § 3466 for reorganization proceedings under the new statute. Indeed the established practice of applying § 3466 to equity receiverships, the acknowledged predecessor of the Chapter X proceeding, combined with the failure to indicate in any way an intent to alter that practice in the new statutes, supports the conclusion that Congress affirmatively meant § 3466 to apply to statutory reorganization.[10]

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ment only upon tax and customs claims, possibly intending to leave the Government in the position of a general creditor with respect to other claims, see S. Rep. No. 1386, *supra*, and this was the form in which the amendment was adopted. Section 199 preserves this apparent distinction between tax and other claims, see text at n. 4, *supra*. However the courts, relying on the strong presumption against implied exceptions to § 3466, have not treated the Government as a general creditor in its nontax claims, but rather have held that it has priority under § 3466. *United States* v. *Anderson*, 334 F. 2d 111 (C. A. 5th Cir. 1964); *In re Cherry Valley Homes, Inc.*, 255 F. 2d 706 (C. A. 3d Cir. 1958); *Reconstruction Finance Corp.* v. *Flynn*, 175 F. 2d 761 (C. A. 2d Cir. 1949).

If, as appears from the present case, § 3466, if applicable, may, in some instances, give the Government greater protection than § 199, it would be anomalous to deny that protection to Government tax claims while granting it to nontax claims, since Congress clearly intended that tax claims should have greater protection.

[10] The leading authorities agree that § 3466 applies to Chapter X proceedings. T. Finletter, *op. cit. supra*, at 388–393; 6A Collier on Bankruptcy 269, n. 11 (14th ed., 1969).

As we noted at the outset, § 3466 must apply according to its terms except where expressly superseded, or where excluded by a later enactment "plainly inconsistent" with it. Here the statute literally applies, and no plain inconsistency with the scheme of Chapter X appears. The terms of § 3466 are clearly not satisfied by the reorganization plan here in question, which provides payment in part to general creditors and other nonpreferred claimants[11] before satisfaction of the federal tax claim. Therefore the judgment upholding the plan must be reversed, and the case remanded to the Court of Appeals for further proceedings consistent with this opinion.

Reversed.

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[11] This case does not raise the question, never decided by this Court, whether § 3466 grants the Government priority over the prior specific liens of secured creditors. See *United States* v. *Gilbert Associates*, 345 U. S. 361, 365–366 (1953).

SUPREME COURT OF THE UNITED STATES

No. 402.—October Term, 1969

United States, Petitioner, v. Sheldon A. Key, Trustee. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March 30, 1970]

Mr. Justice Douglas, concurring.

I join the opinion of the Court. As it holds, the Chandler Act provides the standard for treatment of claims of the United States as "a secured or unsecured creditor" of the debtor. Those are the words of § 199, 52 Stat. 893, 11 U. S. C. § 599. Section 199 goes on to provide that "no plan which does not provide for the payment" of the claims of the United States for taxes or customs duties shall be "confirmed" by the judge, "except upon the acceptance of a lesser amount by the Secretary of the Treasury."

The question therefore is what kind of "payment," as used in § 199, the claim of the United States must receive in a Chapter X proceeding.

There is no doubt but that the claim of the United States has priority by reason of § 3466 of the Revised Statutes, 31 U. S. C. § 191.

Section 216 of the Chandler Act provides the standards for dealing with the priorities among creditors. Section 216 (7) says that where "any class of creditors" affected by the plan does not accept the plan, those claims can be dealt with in several ways including a method which "equitably and fairly" protects them. And § 221 (2) of the Act provides that the judge shall confirm the plan if satisfied that it is "fair and equitable, and feasible."

The words "fair and equitable" are words of art; we have made unmistakably clear that compromising the rights of senior creditors to protect junior creditors is not "fair and equitable" treatment. *Case* v. *Los Angeles Ser. Co.*, 308 U. S. 106, 115–116; *Consolidated Rock Co.* v. *DuBois*, 312 U. S. 510, 527–529. We said in the *DuBois* case:

> "It is plain that while creditors may be given inferior grades of securities, their 'superior rights' must be recognized. Clearly, those prior rights are not recognized, in cases where stockholders are participating in the plan, if creditors are given only a face amount of inferior securities equal to the face amount of their claims. They must receive, in addition, compensation for the senior rights which they are to surrender. If they receive less than that full compensatory treatment, some of their property rights will be appropriated for the benefit of stockholders without compensation. That is not permissible." *Id.*, at 528–529.

The present plan is likewise infirm because it provides junior creditors with immediate, partial payment, while making the United States with a prior claim accept delayed and therefore discounted payment of its claim with all the attendant risks. If the United States is to forgo the right to be paid out of the first available funds, it must receive equivalent compensation in return. The Court of Appeals thought that it contradicted § 216 and § 221 to apply § 3466 to a Chapter X plan. Today we take the contrary view. Section 3466 is relevant in defining the priority; § 216 and § 221 are relevant in providing how that priority shall be honored.